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v.3

REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE COURT
OF THE
VICE CHANCELLOR OF ENGLAND,
DURING THE TIME OF
THE R^T HON^{BL}E SIR JOHN LEACH, KN^T.

By HENRY MADDOCK, Esq.
OF LINCOLN'S INN, BARRISTER AT LAW.

VOL. III.

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SIR THO^s PLUMER - - - MASTER OF THE ROLLS.
SIR JOHN LEACH - - - VICE CHANCELLOR.
SIR R. GIFFORD - - - ATTORNEY GENERAL.
SIR JOHN S. COPLEY - - - SOLICITOR GENERAL.



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ERRATA.

Page 245, line 10 of marginal note, *for* "insane" *read* "sane."
 — 277, *read* "Lowe *v.* Richardson."

From an oversight, after page 286 the next page is 297.

Page 302, the end of the marginal note, add the word "Marriage."

— *Ib.* in note (a) *for* "Winton" *read* "Wilton."

— 471, note (a) *instead of* "345" *read* "144."

Page 320, in the margin, *instead of* "Shepherd" *read* "Attorney General;" and the same correction is necessary in the margin of the subsequent pages of the Report.

C A S E S

BEFORE THE

VICE-CHANCELLOR.

JONES v. FROST, STEADMAN, and others.

1818.

16th January.

THE Bill stated, that *William Jones*, late of, &c. was possessed of a Leasehold Estate, personal Chattels, &c. to a very large amount, and died 31st January 1814, intestate, without issue, leaving the Plaintiff his Nephew, and *one of his next of kin*:—That soon after the death of the Intestate, *William Taylor*, *William Coker*, and also *William Jones* and *Thomas Jones*, who alleged themselves to be also Nephews of the Intestate, entered into possession and receipt of the greatest part of the Leasehold Estates, and received a great part of the Rents and Profits of some Freehold and Copyhold Estates, which accrued due to the Testator in his lifetime, and also the Interest secured on Mortgages and Specialties due to him and in arrear at his death, and

Demurrer allowed, to a Bill by one of the next of kin, for the delivery up of a pretended Will, &c. and for the appointment of a Receiver of the Property of the Intestate, until Letters of Administration were granted by the Ecclesiastical Court; it being unnecessary to

have the Will delivered up; and no ground being stated to show that such Letters of Administration could not be immediately obtained.

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possessed themselves of the Personal Estate, &c. to a very considerable amount, and applied the same to their own use, and refused to pay the Intestate's Debts:—That *William Taylor* and *William Coker* are not in any manner related to the Intestate *William Jones*; and that neither they or *William* and *Thomas Jones* have taken out Letters of Administration to the Intestate:—That the Plaintiff applied for Letters of Administration, as one of the next of kin, but has not yet obtained the same; for that long after the death of the Intestate, *Taylor*, *Coker*, *William Jones*, and *Thomas Jones* produced to the Prerogative Court a Paper Writing or Paper Writings, which they alleged to be the last Will of said *William Jones*, deceased, in order to prove the same; but the Court would not grant Probate of the same, or any Administration, with such alleged Will, to those four persons, who pretended to be the Executors; but though the Ecclesiastical Court refused such Probate, *Taylor*, *Coker*, *William Jones*, and *Thomas Jones* continued in possession of all the Property, or the greatest part of the Intestate's Personal Estate and Effects, and have not deposited the same any where, or distributed the same, but applied it to their own use:—That before the death of *William Jones*, many persons borrowed Money of him on Promissory Notes and other Securities, some of which were outstanding and unpaid until after the Ecclesiastical Court had refused Probate; and that *Taylor*, *Coker*, and *William* and *Thomas Jones*, or some of them, prevailed on some persons who had given Promissory Notes, to cancel those Notes, and give *Taylor*, *Coker*, *William* and *Thomas Jones*, or some or one of them, other Promissory Notes instead of the Notes or Securities which were due from them to the Intestate; and that they, or one of them,

have brought an Action or Actions to recover the amount of such Notes or Securities, or some of them:—That the Plaintiff, as one of the next of kin of the Intestate, is proceeding to obtain Letters of Administration of his Goods, &c.; but such application is opposed by *Taylor, Coker, William and Thomas Jones*, although they have not, nor has any other person, at present, any authority to collect or get in any part of the Intestate's Personal Estate, or Arrears of Rent and Profits of his Real Estate, and such Personal Estate and Effects are in great danger of being lost; and that a Receiver ought to be appointed for the purpose of collecting and receiving all the Arrears of the Rents and Profits of his Real Estates belonging to the said *William Jones*, and also the outstanding part of his Personal Estate, and such parts thereof as have been possessed and received by *Taylor, Coker, William and Thomas Jones*; and that in the meantime they ought to be restrained by Injunction from receiving or getting in all or any part of the Personal Estate and Effects of the Intestate:—The Bill then charged confederacy by *Taylor, Coker, William and Thomas Jones*, with *Robert Frost and Edmund Steadman*, and that the Intestate was not of sound mind when he made the pretended Will, and that the same was not duly executed:—That it was prepared by *Robert Frost* and his Partner *Edmund Steadman*, from the suggestions of *William and Thomas Jones*; that the Will was not read to *William Jones*, deceased; and charging various other facts to show the invalidity of the Will; and also charging, that *Frost* burnt an old Will and other Papers, and possessed himself of other Deeds, Papers and Writings relating to the matters in the Bill stated, which he has in his possession. The Bill also charged, there were divers

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other persons who claim to be the next of kin of the said *William Jones*, deceased, in the same degree as the Plaintiff; but the Plaintiff was unable to state who are such next of kin, or where they reside. The *Prayer* of the Bill was, that said pretended Will of 29th day of January 1814, might be declared to have been obtained by fraud, and that the same might be delivered up to Plaintiff to be cancelled:—That an account might be taken of all the Personal Estate and Effects of said *William Jones*, deceased, which had been possessed or received by said Defendants, or any or either of them, or by any person or persons by their or any or either of their order, or for their or any or either of their use; and that the same might forthwith be paid into Court, or secured in such manner as the Court should direct, for the benefit of Plaintiff and such other persons as should appear to be entitled thereto:—That all the Securities for Money, Deeds, Papers and Writings relating to the Personal Estate of said *William Jones*, and which were in the possession or power of said Defendants, or any or either of them, might be forthwith deposited with one of the Masters of the Court, or secured in such other manner as the Court should direct, for the benefit of Plaintiff, and of such persons as should appear to be entitled thereto:—That a Receiver might be appointed, not only to call in and receive the outstanding Personal Estate and Effects of said *William Jones*, deceased, but also all such Rents and Profits of said Intestate's Leasehold Estates as aforesaid; and that such Receiver might pay all such Monies into Court, to be secured for the benefit of Plaintiff, or of such person or persons as should appear to be entitled thereto:—That in the meantime the said several Defendants might be restrained by the Order

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and Injunction of the Court from receiving all or any part of the Rents and Profits of the said Leasehold Estate and Premises hereinbefore mentioned, and from committing any spoil, waste, or destruction on said *William Jones's* said Leasehold Estates, Buildings, Tenements, Lands and Premises whatsoever, or on any part thereof; and might, in like manner, be restrained from collecting, receiving, or getting in any part of the outstanding Personal Estate of said *William Jones*; and that all necessary directions might be given to effectuate the several purposes aforesaid.

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To this Bill a general *Demurrer* was put in by *Frost* and *Steadman*:—" That the Plaintiff hath not, in and by his Bill of Complaint, stated any matter of Equity whereon this Honourable Court can ground any Decree, or give him any relief, as against these Defendants :— That there is a want of necessary Parties to said Bill; for by Plaintiff's own showing, in and by such Bill, he is not the only next of kin of said *William Jones*, in the said Bill named; and all the next of kin of the said *William Jones*, as appears and is shown by the said Bill, are material and necessary parties to the said Suit, but are not in fact Parties thereto :— That although such Bill seeks and prays to have the Will or pretended Will of said *William Jones* delivered to him said Plaintiff, to be cancelled; yet all the Parties interested in or under such Will are not made Parties to said Suit."

Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Barber*, in support of the Demurrer:—

An objection will be made, that a Defendant cannot state, in a Demurrer, three separate grounds of

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and others

Demurrer; but as to that, *Harrison v. Hegy* (a) is an answer; for in that Case a Demurrer for three causes was allowed. The first ground of Demurrer is for want of Equity. A Court of Equity will not interpose in the manner prayed by this Bill, where the Property is only sought to be secured and not distributed. It is true, that in *Atkinson v. Henshaw* (b), it was determined that a Bill will lie for an account of Personal Estate, and a Receiver, pending a litigation for Probate, though an administration *pendente lite* might be obtained in the Ecclesiastical Court; but then in his Bill the Plaintiff should state the proceedings in the Ecclesiastical Court, and it should be specially shown on what account the Ecclesiastical Court refuses Probate. In *Atkinson v. Henshaw*, collusion was charged between the litigant Parties in the Ecclesiastical Court, for the purpose of suffering the Property to be used; a reason was shown why the Probate was delayed, and the probability of a continuance of the delay. The frame of this Bill is not for the express purpose of obtaining security *pendente lite*, but its main object is to set aside the Will.

Then as to the second ground of Demurrer, that the other next of kin ought to have been made Parties:—they certainly ought; they are equally interested with the Plaintiff, and might file another Bill.

The third ground of Demurrer is, that all the Persons interested under the Will are not made Parties. They should either have made only the Executors of the Will, Parties; or if they made persons interested, Parties, all such should have been Parties.

(a) 2 Ves. jun. 323.

(b) 2 Ves. and Bea. 85.

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Mr. Hart, and Mr. Ager, in support of the Bill.

This Demurrer is bad in form and substance. In form it is bad, because three causes of Demurrer are assigned, *Lord Suffolk v. Green* (c), *Chapman v. Turner* (d). Double Pleading is in like manner disallowed, *Knebblison v. Hastings* (e).

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Atkinson v. Henshaw (f) is an authority as to the first ground of Demurrer, that *pendente lite* in the Ecclesiastical Court, a Bill may be filed for a Receiver. A Will may be set aside as to part, if part of the Will has been fraudulently inserted.

As to the second ground of Demurrer, it cannot be sustained. The Bill states, there are other next of kin, but who they are, and where they live, he does not know.

The third ground of Demurrer is equally untenable. If all Parties interested are to be made Parties, the Creditors of the late *William Jones* should be made Parties. *Frost* and *Steadman* were made Parties, not merely because they claim an interest under the Will, but because they prepared the Will, and obtained possession of Papers of the Intestate. It is clear that Attorneys concerned in a Fraud may be made Parties.

Mr. Bell (in the absence of Sir *Samuel Romilly*) was about to reply, but was stopped by His Honor.

The VICE-CHANCELLOR:—

The first objection to the Demurrer is as to its form, the Defendant having assigned three causes of

(c) 1 Atk. 350.

(d) 1 Atk. 54.

(e) 2 Ves. jun. 34. S. C. 4

Evo. C. C. 253.

(f) 1 Atk. 450.

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Demurrer. The Cases cited do not support this objection.

Double Pleas are not allowed in Equity; because if the Case cannot be reduced to a single point, the defence may be more conveniently made by answer; but by a Demurrer the Defendant may assign as many reasons as he pleases why the Plaintiff on his own showing is not entitled to relief.

With respect to the first ground of Demurrer, it is true, that if upon any part of the Bill the Plaintiff is entitled to relief, a general Demurrer cannot be supported. The objects of this Bill are, to have the Will delivered up to be cancelled, and for a Receiver and an Injunction. To attain the first object, the Bill charges incapacity in the Testator; but that is matter upon which the Ecclesiastical Court has the sole jurisdiction; and though the Ecclesiastical Court has decreed against the Will, as having been obtained by fraud, this Court will not order the Will to be delivered up; for being declared a nullity by the proper Court, it can never be made use of.

Then as to the Receiver and Injunction. If this Bill had stated a Case, by which it appeared that the Defendants had interposed impediments, which made it now impracticable for the Plaintiff to obtain his Letters of Administration in the Ecclesiastical Court within any reasonable time, then, for the protection of the Property, this Court might have interfered. In *Atkinson v. Henshaw* there were special grounds for the interference of the Court; there was collusion between the Parties litigating the Will

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in the Ecclesiastical Court, for the purpose of delay; but this Bill, after stating that the Ecclesiastical Court had decreed against the pretended Will set up by the Defendants, only alleges that the Defendants oppose the application which the Plaintiff is now making for Letters of Administration. The Bill states no ground of opposition on the part of the Defendants; and nothing appears upon this Bill to show that the Plaintiff may not, in due course, obtain the Administration. This is not, therefore, a Case in which a Court of Equity is called upon to interfere, by the appointment of a Receiver; and being of opinion that the Demurrer is good upon the first ground, for want of Equity, it is not necessary for me to consider the other grounds of Demurrer.

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FROST,

and others.

Demurrer allowed.

1818.

SMITH and SNOW, v. SNOW and others.

17th January.
One of Seven Persons entitled to a certain aliquot Share in an ascertained Sum standing in Trustees names, filed his Bill against the Trustees and the other Cestui's que Trust, to have his Share transferred. Demurrer for want of Equity by the Cestui's que Trust Defendants, allowed.

THE Plaintiff Smith, was the Assignee of the Plaintiff Snow's Seventh Part or Share in certain Funds standing in the name of Trustees, two of the Defendants. The Plaintiffs Smith and Snow filed their Bill against the Trustees, and against six of the Cestui's que Trust, Brothers and Sisters of the Plaintiff Snow, to have the Seventh Part or Share of the Plaintiff Snow transferred to the Plaintiff Smith. To this Bill, four of the Defendants, Brothers and Sisters of the Plaintiff Snow, (two of the Defendants, his Brothers, being out of the Jurisdiction) put in the following Demurrer.

“These Defendants, &c. for cause of Demurrer show that no relief is prayed by the Bill against these Defendants, and that the said Complainants have not by their said Bill made such a case as entitles them in a Court of Equity to any discovery from or against these Defendants, touching the several matters in the Bill of Complaint mentioned, or any of them, or as entitles them to any relief or assistance against the Defendants. Therefore, &c.”

Mr. Spranger, for the Demurrer:—

There was no necessity for making these Persons Defendants; no relief is prayed against them; and it is a Rule that no one need be made a party against whom, if brought to a hearing, the Plaintiff can have no decree (a). What the Plaintiff Snow is entitled to,

(a) De Golls v. Ward, and Meal, 3 P. Wms. 310. mentioned in Note to Wych

is ascertained, and the Trustees can without difficulty transfer his Share.

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others.

Mr. Treslove, in support of the Bill:—

The Defendants being interested with the Plaintiff Snow in an undivided Fund, they were necessary Parties. There is, besides, a charge of combination.

The VICE-CHANCELLOR:—

There is no special charge of combination; but only the general words as to combining, which are unimportant.

The question is, Whether a Party who is entitled to a certain aliquot proportion of a certain ascertained Sum, can file a Bill to have it transferred to him, without making the Persons entitled to other aliquot Shares of the Fund, Parties. Persons not interested in the Suit cannot be made Parties, and it is sufficient to say that it is not alleged that these Defendants have any interest in this Suit. My only difficulty is, whether Trustees can be called upon to act in the execution of their Trust, by parts, as in that case seven different Bills might be filed against them; but that I think is not so great an inconvenience as the allowing of such a Bill as this would be.

Demurrer allowed.

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1818.

BATCHELLOR v. SMALLCOMBE.

18th and 28th January.
Agistment Tythe is not claimable for Afterpasture, where the Lands have been mown in the same year, and paid Tythe.

THE Bill stated that, on the 1st August 1812, the late *John Batchellor* was instituted and inducted into the Vicarage of the Parish and Parish Church of *Bitton*, in the County of *Gloucester*, and as such Vicar, by some ancient endowment, usage, custom or prescription, he was entitled to the Tythes of all and singular the tytheable matters and things arising, &c. within the Parish of *Bitton*, in the same manner as his Predecessors had or ought to have received the same:—That from the time of *Batchellor's* so becoming Vicar, and up to the time of his death, the Defendant held and occupied divers Lands and Tenements within the Parish, for the Tythes of which the Defendant duly accounted with *Batchellor* up to the 25th of March 1814:—That the Defendant, from and after the said 25th of March 1814, and up to the time of the death of *Batchellor*, kept and fed on his Lands divers ewes and sheep which had been shorn and yielded wool, and divers cows which brought calves and yielded milk, and divers mares which produced foals, and divers sows, &c. &c. (enumerating other Tythe:)—That also, “ during the time aforesaid, he kept, fed and agisted, or depastured on his said Lands, divers numbers of sheep, which have not produced lambs and wool, or after they have produced him lambs and wool; and divers numbers of barren and unprofitable cattle, by the agisting and depasturing of which, he hath made great profit.” The Bill then charged, that Tythe is due, and of right accustomed or ought to be paid for or in respect of all sheep and barren and unprofitable

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cattle fed and depastured, although the Lands on which the same have been so fed and depastured, have in the same year been mowed for Hay; and that such Tythe hath immemorially been paid to the Vicar of the said Parish and Parish Church of *Bitton* for the time being, by the different occupiers of Land within the said Parish; and that the Defendant had accounted with *Batchellor* in his life-time for the Tythe of sheep and barren and unprofitable cattle that had been fed and agisted by him, although the Land on which the same had been so fed and depastured had in the same year been mowed by him for Hay, and the Tythes thereof paid or set out by him to or for the lay Impropriator of the said Parish." The Bill further charged, that the said Lands on which the said sheep and other barren and unprofitable cattle had been so fed and agisted by the said Defendant, since the said 25th day of March 1814, as aforesaid, were not, or were any of them mowed by him in a proper usual or husbandlike manner, or at a time when it is customary in that part of the country in which the said Lands are situated, to-mow grass for Hay; but that the said Lands were mowed by the said Defendant early in the month of June, and long before there was a full crop on the same; and that the said Defendant caused the said Lands to be mowed in such a manner, that a great part of the crop then being and growing thereon, was not cut and made into Hay, but purposely and designedly left standing and growing on the said Lands, whereby the Tythe of the Hay produced from the said Lands was greatly reduced in value:—The Bill also charged, that the Defendant caused the said Lands to be mowed at the time and in the manner aforesaid, and afterwards to be fed and depastured with sheep, and

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barren and unprofitable cattle, for the express purpose of defrauding Plaintiff, and the said Improper Rector of the said Parish, or one of them, of their or his legal right to the full value of the Tythes arising from said Lands; and as evidence thereof, Plaintiff charged that the value of the crop of grass left upon the said Lands at the time when the same were so improperly mowed as aforesaid, and of that subsequently growing and arising thereon, was of very great value, and in fact, of much greater value than the crop of grass which had been so cut and made into Hay as aforesaid; nevertheless, the said Defendant had refused to render Plaintiff any account of the sheep and cattle so fed and depastured by him, or other tytheable matters and things aforesaid. The *Prayer* of the Bill was for the usual account of such Tythes.

To this Bill, the Defendant put in a *Plea* and *Answer*. The Plea, after stating those parts of the Bill to which the Plea applied, proceeded thus:—This Defendant, for Plea, says, “That all the Lands in the occupation of this Defendant, situate within the Vicarage and Parish of Bittos, in the said Bill of Complaint mentioned, whereon this Defendant at any time in any year, from the 25th day of March 1814 to the ----- day of October 1816, kept, fed, and agisted or depastured sheep not producing lambs or wool, or kept after they had been shorn, or other barren or unprofitable cattle, (except the Close called *Sandmead*, and the Close called the *Horse Close*, and the part of the *Orchead* in the Bill mentioned, during the respective periods aforesaid,) had been in the Summer immediately previous to the depasturing of the said Lands, mown, and the Tythe of the hay thereof had been set

out and tendered to and taken by the Tenant or Lessee of the Improper Rector of the said Parish, to whom the Tythes of hay within the said Parish are of right due and payable;" and then the Defendant averred, "that no Tythe is due or has ever been of right accustomed to be paid within the said Parish of Bitton, for or in respect of Sheep and barren and unprofitable Cattle fed and depastured, when the Lands on which the same have been fed and depastured have, in the same year, been mowed for Hay; and that such Tythe has not immemorially been paid to the Vicar of the said Parish and Parish Church of Bitton aforesaid, for the time being, by the different occupiers of Lands within the said Parish: And this Defendant avers, that the several Lands on which Sheep or other barren and unprofitable Cattle have been fed and agisted by this Defendant since the said 25th day of March 1814 (except the before excepted Lands during the respective periods aforesaid), were mowed by him in a proper, usual, and husbandlike manner, and at a time when it is customary in that part of the country in which the said Lands are situated, to mow grass for hay; and that this Defendant did not cause the Lands to be mowed at any time or in any manner, and afterwards to be fed and depastured with Sheep and barren and unprofitable Cattle, for the purpose of defrauding the said John Butchell deceased, or the said Complainant and the Improper Rector of the said Parish of Bitton, or any or either of them, of their legal right to the full value of the Tythes arising from the said Lands: And this Defendant not waiving, &c. says he denies it to be true that Tythe is due, or of right accustomed or ought to be paid for or in respect of all Sheep and barren and unprofitable Cattle fed and depastured, although the

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Lands on which the same have been so fed and depastured have in the same year been mowed for Hay; or that such Tythe has immemorially been paid to the Vicar of the said Parish and Parish Church of *Bitton* for the time being, by the Occupiers of Land within the said Parish: And this Defendant further denies it to be true, that the Lands on which Sheep and other barren and unprofitable Cattle have been fed by the Defendant since the time in the said Bill mentioned, or any of them, were mowed by him in an improper and unusual and unhusbandlike manner, or at a time when it is not customary in that part of the country in which the said Lands are situated, to mow Grass for Hay; though this Defendant admits that the said Lands were in general mowed or begun to be mowed by this Defendant early in the month of June, being according to the usual custom in the said Parish of *Bitton*: And this Defendant denies that the said Lands, or any of them, were so mowed before there was a full Crop on the same; or that this Defendant caused the said Lands to be mowed in such a manner, that a great part of the Crop then being and growing thereon was not cut and made into Hay, but purposely and designedly left standing and growing on the said Lands; or that this Defendant caused the said Lands to be mowed at any time or in any manner, and afterwards to be fed and depastured with Sheep and barren and unprofitable Cattle, for the purpose of defrauding the said *John Batchellor* deceased, or the said Complainant and the Improper Rector of the said Parish, or any or either of them, of their or his legal right to the full value of the Tythes arising from the said Lands; or that the crop of Grass left upon the said Lands at the time when the same were mowed, and that subsequently growing

and arising thereon, were of greater value than the crop of Grass which had been cut and made into Hay, although this Defendant admits the same to have been of some, but not of great value, nor of any further or any value than the Aftermath arising from other Lands within the said Parish, of equal goodness, and fairly mowed for Hay; and the respective value of the said Crops this Defendant is unable now to set forth, from his remembrance, belief, or otherwise, further than as aforesaid." The Defendant then answered as to the other Tythes claimed.

The only question agitated was, as to the right claimed of Agistment Tythe.

The *Solicitor General*, and Mr. *Wilbraham*, in support of the Plea :—

It has been a settled Rule for these 200 years past, that when Lands have been mowed in the same year, and a Tythe of Hay has been paid, no Tythe of Agistment is payable. Lord *Coke* (a) and *Roll* (b), state that. So in *Grene v. Austen* (c), *Ayd v. Flower* (d), a Case precisely like the present. *Franklyn v. Master*, &c. of *St. Cross* (e), *Chapman v. Keep* (f), *Ellis v. Saul* (g). These Text Writers and Cases, are uncontradicted by any Decisions. There is a distinction between Aftermath and After-pasture; the former pays Tythe, because a fraud might be practised to increase

(a) 2d Inst. 652.

(d) 2 Gwill. 613.

(b) *Roll's Abr.* 640.

(e) 2 Gwill. 629.

(c) 1 Gwill. 226. S. C.
Yelv. 86.

(f) 2 Gwill. 779.

(g) 4 Gwill. 1326. S. C.

1 Anstr. 332.

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the second Crop, and such Crop impoverishes the Land; but After-pasture does not pay Tythe, because the latter mode of using the grass improves the Land.

Sir *Samuel Romilly*, and Mr. *Trollope*, in support of the Bill:—

According to the old doctrine, Tythe was not payable for Aftermath, or After-pasture. Lord Coke (*b*), citing *Baxter's Case*, says, “ It was resolved and adjudged, that a Parson shall not have two Tythes of one Land in one year, as of corn, and of the stubble or herbage of hay, and of the *After-pasture, et sic in similibus.*” So in *Roll* (*i*), it is laid down, “ If a man pay Tythe of hay, no Tythe *de jure* ought to be paid afterwards for the pasture of the same Land, for the same year, for he shall not pay Tythes twice in the same year for the same things, *for the After-pasture is only the relics of the hay which paid Tythes before.*” *Burn* (*l*), (a respectable Writer, but no authority) as to this doctrine, says, “ Nevertheless, notwithstanding these great Authorities, the modern Determinations in Equity are directly contrary, for that the balk and meres, the headlands, stubble, and after-eatage, are as much a part of the increase of that same year as the corn or hay;” and he afterwards (*m*), speaking of Agistment

(*b*) 2 Inst. 652.

(*i*) 1 Roll's Abr. 640.

(*l*) 3d vol. Ecclesiastical Law, p. 442.

(*m*) 3 Burn's Ecclesiastical Law, 435, ed. 1788. In *Tenant v. Stubbing*, 3 Anstr. 640, it was decided that “ stubble mowed and used as fodder or manure is not tytheable, un-

less the Farmer leaves an unusual quantity of stubble to make a fraudulent profit of it.”: and *Chief Baron Macdonald* observed, “ A doubt is suggested in *Burn*, on the general principle that Tythes are due of every increase of the Land; and the modern practice of the Courts of Equity is said to be

Tythe for *After-pasture*, and quoting the old Authorities against Tythe for the pasture of the same Land in the same year it has paid Tythe of hay, says "The modern Determinations in Equity will not allow of these distinctions, for the Aftermath or *After-eatage* are undoubtedly part of the increase of the same year." It is admitted, that notwithstanding the old Authorities, it is now settled, that if a second crop of Hay be taken in the same year, it pays Tythes as well as the first crop: it is no longer considered as "the relics of the Hay which paid Tythe;" and there can be no reason why, if instead of taking a second crop, cattle are agisted, they should not pay Tythe. *Burn* alludes to modern Determinations to that effect; but he does not name them. There are, however, several such Cases in *Wood*. *Hill v. Branson* (*n*), *Hicks v. Triese* (*o*), *Bennett v. Peart* (*p*), *Baker v. Mason* (*q*), *Howes v. Carter* (*r*). The doctrine laid down in *Lynwood* is, "*Si eadem terra bis vel ter seminantur fuerit vel sepius pastum producerit danda toties sunt decimae.*" Thus, Pigeons, Pigs, and other animals that bring forth twice a year, pay double Tythe. So of Sheep. And it is held that Garden Ground shall pay Tythes for different crops. So Turnips, when they are palled, pay Tythe, though often sowed, and though upon the same Land, *Benson v. Watkins* (*s*). In *Ellis v. Saul*, which has been mentioned, none of the Cases

contrary to the old authorities, but this seems to be a mistake; no case to that effect is mentioned in the Books, nor exists in the memory of any person. The old authorities (1 *Roll's Abr.* 641, 2 *Inst.* 652, which had been cited in the Argument,) decided the point, which

seems to have been at rest ever since."

(*n*) 3 *Wood, Tythe Cases*, 18.

(*o*) *Ib.* 363.

(*p*) 4 *Wood, Tythe Cases*, 236.

(*q*) *Ibid.* 257.

(*r*) *Ibid.* 450.

(*s*) 2 *Gwill. 612.*

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in *Wood* were cited. The reason why in former times Aftermath and After-pasture did not pay Tythe was, because owing to the deficient cultivation of Lands at that period, the Aftermath and After-pasture were of little value; but afterwards, when from the improved cultivation of Land they became valuable, they also became Tytheable (*t*). In *Andrews v. Lane* (*u*), it was held that Woad twice produced in one year, was twice Tytheable (*x*). There would be great inconvenience, and a great inlet to fraud, if this Plaintiff is not entitled to the relief he prays.

The VICE-CHANCELLOR:—

28th January.

The Question, here, is a mere Question of Fact—what is the Common Law in this respect?

What the Common Law is, can only be discovered from the Text Writers and Reports. Lord *Coke* and

(*t*) It is clear that Aftermath pays Tythe, notwithstanding what is said by the old writers; but it is observable, that so late as *Norton v. Briggs, Raymond*, 242, 3, S. C. Lutw. 1043, not noticed in *Gwillim, Chief Justice Treby* said, “Tythes are not payable of Aftermath *de jure*, and therefore it is but a form to lay a custom to be discharged thereof in consideration of making the former mowing into hay, for Tythes are payable only of things *semel in anno renovantibus*”

In 2 Hy. 4. Rot. Parl. 93, noticed in 1 *Gwill. 12*, and at

the end of *Cunningham* on Tythes. The Commons complained of Agistment Tythe in respect of Lands, which had paid Tythe of hay in the same year; but the answer of the King was, “Let him who shall find himself grieved, sue specially.”

Viner, in his Abridgment, 8 vol. 574, &c. quotes this Record again and again.

(*u*) 2 *Gwill. 473*.

(*x*) According to the report of this case in *Gwillim*, 2d vol. p. 478, it appears the consideration of it was adjourned, and what was the final decision does not appear.

Roll both state, that Tythe is not payable in respect of Agistment of Land which has been mowed and paid Tythe in the same year. The reason they give is not satisfactory, but they clearly state what the Common Law was. In *Grene v. Austen*, it was held by the Court, that as the Owner of the ground pays Tythe of Hay, he is thereby discharged of Common Right from Tythe of Agistment of the same Land in the same year. Then followed *Ayd v. Flower*, *Franklyn v. Master*, &c. of *St. Cross*, *Chapman v. Keep*, and *Ellis v. Saul*. All these Cases coincide with the doctrine of the Text Writers, that Tythe is not payable for Agistment, where the same Land has in the same year paid Tythe of Hay. But then it is said, there are four Cases in the Exchequer, which have been cited from *Wood*, in which it was held, that Tythe, under such circumstances, is payable for Agistment. All that appears from *Wood*, is, that in those Cases the Defendants alleged in their Answers, that they ought not to pay Agistment Tythe demanded, because the Lands had been mowed in the same year; and that notwithstanding such Allegations, there had been general decrees for an account of the Tythe demanded. Three of those Cases, *Hill v. Branson*, *Hicks v. Triese*, and *Bennet v. Peart*, occur between 1742 and 1790. *Howes v. Carter* was in 1794; but in *Chapman* and *Keep*, in 1742, it was determined that no Agistment Tythe was in such case payable; and in *Ellis v. Saul*, which came on in 1790, the Counsel considered the Law as so clear, that they abandoned the claim to Agistment Tythe for After-pasture. Is it possible the Counsel and the Court could be ignorant of these Cases mentioned by *Wood*, if there really had been any such decisions? There is no other report of those Exchequer Cases, but as

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they are given in *Wood*, except one, *Howes v. Carter*, which is reported in *Anstruther* (y), and in which, according to that report, nothing else was determined, than that Sheep kept principally for the sake of folding, if sold out of the Parish before shearing time, should pay an Agistment Tythe (z). *Gwillim* has reported all the Cases he could collect on the subject of Tythes from printed Reports, and also from MS. Notes, with which he was liberally furnished; and it is surprising he should not have noticed any of the Exchequer Cases mentioned by *Wood*, except *Howes v. Carter*, determined on another point, if there were any such Decisions on them; especially as they would have introduced so novel a doctrine. *Wood's Book* is a mere collection of Pleadings, with the Decrees of the Court in Tythe Cases, without stating the proofs in the Cause, or any of the Arguments of Counsel, or Reasons of the Court. It must therefore be inferred, that in the Cases he mentions, the Allegations in the Answers were not made out in proof.

It might be reasonable, in the present improved state of Agriculture, that Agistment Tythe should be payable for After-pasture, but that is matter for the consideration of the Legislature: I am bound to say, that by the Common Law, as collected from the text writers, and a long series of Decisions, it is clear, that where the Land has been mown for Hay, and paid Tythe, Agistment Tythe for After-pasture in the same year, is not demandable. The Plea therefore must be allowed.

Plea allowed.

(y) 2 Anstr. 500.

(z) That Case was determined on the authority of *Bateman v. Aistroppe*, decided

in the Exchequer 3d *Gwill.*
1048, and confirmed on Ap-
peal to the House of Lords.

1818.

Ex parte BONBONUS, in re LEMAN.

THE Petition stated, that the Bankrupt's Estate had been assigned to the Petitioner and *John Edmonds*, as Assignees:—That *John Edmonds* had quitted the country, and was then, as supposed, resident in France: And Prayed that the Bargain and Sale and Assignment of the Bankrupt's Estate might be vacated:—That a Meeting of the Commissioners might be called to choose a new Assignee in the place of *John Edmonds*, and that when so chosen, a Bargain and Sale of the Real, and an Assignment of the Personal Estate might be executed to the Petitioner, and the new Assignee when so chosen; and that service of the Petition at the last place of residence of *John Edmonds* might be deemed good service; and that the Costs of the Petition might be paid out of the Bankrupt's Estate.

20th January.
One of Two Assignees having quitted the country, a Petition was presented by the remaining Assignee, that the Bargain and Sale to the Two Assignees might be vacated, and that a choice should be made of a new Assignee in the stead of the one abroad, and that a new Bargain and Sale might be executed to the Petitioner, and the new Assignee; and that service of the Petition at the last place of residence of the Assignee abroad

Mr. Koe, for the Petitioner, produced an Affidavit of the service of the Petition at the last place of residence of *John Edmonds*.

The Vice-Chancellor made the Order, according to the Prayer of the Petition.

might be deemed good service. On production of an Affidavit of service of the Petition, an Order was made according to the Prayer of the same.

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BROWNE v. POYNTZ.

21st January.

If Answer is put in, and exceptions are taken to the Answer, the Defendant cannot move upon the Answer, that the Plaintiff may be put to his Election to proceed at Law or in Equity.

THE Plaintiff filed his Bill 17th June 1817, and an Answer was put in 10th December 1817. The Defendant obtained an Order on the 22d December following, in the usual terms, that the Plaintiff should elect within eight days after service of the Order, whether he would proceed at Law or in Equity. On the 23d December, Exceptions were filed to the Answer. On the 10th January 1818, the Plaintiff served the order to elect.

Mr. Wakefield now moved, that the Order to put the Plaintiff to his Election might be discharged for Irregularity. He observed, it was clear from *Tillotson v. Ganson* (a), that until an Answer is given to the Plaintiff's Bill, he cannot be put to his Election; and it was equally clear, that an Answer is incomplete and as no Answer, until exceptions to it are answered; and it is only when a sufficient Answer is put in, that the Defendant can put the Plaintiff to his Election. There is no case expressly in point; but there are several analogous cases. A defendant is entitled to the Costs of an Answer to a Bill of Discovery, but if his Answer is excepted to, he cannot move for his Costs until he has answered the Exceptions. So, if a Plea be put in to a Bill, the Defendant cannot move to put the Plaintiff to an Election, until the Plea is decided upon, as was held in *Vaughan v. Welsh* (b), and in an *Anonymous Case* in the same Book (c).

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| <p>(a) 1 Vern. 103; and see
 <i>Jones v. Earl of Stafford</i>, 3 P.
 Wms. 90.</p> | <p>(b) Moseley, 210.
 (c) <i>Ibid.</i>, p. 304.</p> |
|---|---|

Mr. Shadwell, in support of the Order:—

No rule is laid down when an Order to elect must be served. From the quantity of business in the Register's Office, the Order cannot be drawn up immediately. The Order was made before the Exceptions were filed. The Order is founded on the Answer, from which it appears that the Plaintiff is proceeding at Law and in Equity for the same demand.

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The VICE-CHANCELLOR:—

The Plaintiff is entitled to a complete Answer before he can be put to an Election, for it may be, that until he has a complete Answer, he cannot decide in which Court it will be most advisable he should prosecute his Claim: he cannot therefore be put to his Election after Exceptions are filed, until they are answered; and it is irregular to obtain an order to elect before the common time for filing Exceptions is expired.

Motion granted, without Costs.

1818.

*Ex parte WORTHINGTON, in re BENJAMIN GRAY,
JAMES GRAY, ROBERT WILSON, and JAMES
RICHARDSON, Bankrupts.*

22d January.

Where a Firm of four Persons become Bankrupts, the Creditors of a Firm of three of such Bankrupts, may, under Lord Rosslyn's General Order, prove under the Commission against the four, and no Order is necessary for that purpose.

THE Petition stated that *Benjamin Gray, James Gray, and Robert Wilson*, carried on business as Merchants at Liverpool, under the Firm of *Grays, Wilson, and Company*; and in 1815, they established another Firm in London, in Partnership with *James Richardson*, under the Firm of *Benjamin Gray and Company*, principally for the purpose of the Firm of *Gray's, Wilson and Co.* drawing Bills upon them in the course of their carrying on their business at Liverpool; and *Benjamin Gray and Co.* also carried on the business of Brokers:—That on the 26th August, a Commission issued against *Benjamin Gray, James Gray, Robert Wilson, and James Richardson*, as carrying on trade in London, under which they were declared Bankrupts; and *John Watson and Thomas Harbottle* were chosen Assignees:—That the Petitioners are Creditors of the Firm of *Gray's, Wilson and Co.* in the sum of 2,000*l.*; and the whole amount of Debts due from the Firm, amounted to 80,000*l.* The Prayer of the Petition was, that the Assignees under the said Commission might be ordered to keep distinct Accounts of the Estate and Effects of the two Firms of *Gay's, Wilson and Co.*, and *Benjamin Gray and Co.*; and that the Petitioners might be at liberty to call one or more Meeting or Meetings of the Commissioners, and that the Petitioners and the other Creditors of the Firm of *Gray's, Wilson and Co.* might be at liberty to prove their Debts under the Commission, to the account of the Firm of *Gray's, Wilson and Co.*;

and that the Estate and Effects of that Firm might be distributed *pro rata* amongst the Creditors of the same.

The Petition was supported by an Affidavit.

Mr. Whitmarsh, in support of the Petition:—

An Order is necessary in this Case, to enable the Petitioners to prove it not falling within the words of Lord Rosslyn's *General Order*, 8th March 1794. There is a difference among Commissioners on this point; some admit the proof of such Debts as these, without an Order; others think an Order necessary.

Sir Samuel Romilly, and Mr. Montagu:—

In Rowland's Bankruptcy, the *Lord Chancellor* held this Case within the General Order.

The VICE-CHANCELLOR:—

This Case is within the meaning, though not the words, of Lord Rosslyn's Order.

Petition dismissed, without Costs (*a*).

(*a*) See *Ex parte Mason*, 1 Rose, 423.

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Ex parte
WORTHINGTON and
another, in re
GRAY and
others.

1818.

22d January.

Certain Stock standing in the Name of the Bankrupt, the Dividends of which had not been claimed, was, under the 56 Geo. III. c. 60, transferred to the Commissioners for the reduction of the National Debt. The Assignee of the Bankrupt, by Petition under the Act, claimed the Stock as part of the Bankrupt's Effects. Another Person, by Petition, claimed the Stock, insisting that the Bankrupt was a Trustee for him. A reference was directed to the Master to ascertain whose Stock it was, and in the mean time, the Stock was directed to be transferred into the name of the Accountant General.

Ex parte GILLETT, Ex parte BACON.

THE Petition of *Ex parte Gillett* stated, that on the 26th of February 1810, a Commission of Bankrupt issued against *John Bannister Hudson*, under which he was declared Bankrupt:—That the Petitioner and *John Tierney* (since deceased,) were chosen Assignees, and the usual Assignment was made to them:—That on the 10th of April, *Hudson* passed his last Examination, and made no disclosure of the Stock after mentioned, and shortly after left *England* for the *East Indies*, and hath not obtained his Certificate:—That the Petitioner had recently discovered, that from the Month of July 1806, until the Transfer after mentioned, there were standing in the name of *Hudson*, by the description of *John Bannister Hudson*, Esquire, the sum of 3,170*l.*, *Three per Cent. Consols*, and also the sum of 636*l.* in the name of *Hudson*, (by the description of *John Bannister Hudson*, of *Hackney Grove*, Gentleman;) the Dividends on which said two Sums remained unclaimed from the said Month of July, until the Transfer after mentioned:—That under the 56th *Geo. III. cap. 60*, “An Act to authorize the transferring Stock upon which Dividends shall remain unclaimed for the space of at least ten years at the Bank of England, and also all Lottery Prizes and Benefits, and Balances of Sums issued for paying the Principals of Stocks or Annuities, which shall not have been demanded for the same period, to the Commissioners for the Reduction of the National Debt.” The two sums of 3,170*l.* and 636*l.*, together with the Dividends which had accrued thereon, were on the day of transferred, as in the Act prescribed, from

the name of the Bankrupt, into “*The Account of the Commissioners for the Reduction of the National Debt*:—That *Hudson*, previous to, and at the time of his Bankruptcy, resided at *Hackney Grove*, and was described in the Commission as “*John Bannister Hudson*, late of *Hackney Grove*, in the County of *Middlesex*, and also of the *Old City Chambers*, in the City of *London*, Merchant, Dealer and Chapman;” and that the said sums were the Property of the Bankrupt in his own right at the time of the Bankruptcy:—That the Petitioner, as sole Assignee, was entitled to the said two sums of 3,170*l.* and 600*l.*, and was desirous that the same should be transferred to him, and that the Dividends due thereon should be paid to him; but that the Governor and Company of the Bank of England had refused to make such Transfer and Payment without the Order of the Court:—*The Prayer* of the Petition was, that the 3,176*l.* and 636*l.* *Three per Cent. Consols*, standing to the account of the Commissioners for the Reduction of the National Debt, might be ordered to be transferred to the Petitioner, together with the Dividends due and to become due thereon.

An Affidavit was filed by the Petitioner, verifying the Statements in the Petition.

The Petition of *Bacon* stated, That at various periods during the years 1804 and 1805, he was resident in *India*, and remitted to *Hudson*, his Brother-in-law, various Bills to the amount of 22,000*l.*, with strict injunctions to invest the produce of such Bills as they became due to the best advantage, in the Public Funds, in the name of the Petitioner:—That *Hudson* received the amount of the Bills, and gave credit in

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GILLETT,
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his account to the Petitioner for the same:—That on the Petitioner's arrival in *England*, he called on *Hudson* for a statement of Accounts between them; on the production of which, the Petitioner discovered, that instead of the produce of the Remittances having been invested in the Funds in the name of the Petitioner, *Hudson* had speculated in the Funds in his own name, and had again sold out the greater part of such Stock, and spent and lost the Money in Trade:—That the Petitioner was a Creditor under the Commission for 16,000*l.* and upwards, and proved his Debt under the same, and has received two Dividends amounting to 2,340*l.*:—That he has recently discovered that there is now, and hath ever since July 1816, been the sum of 3,170*l.* and 636*l.* standing in the *Three per Cent. Consols*, in the name of the Bankrupt, and that the Dividends on the same, including and since the said Month of July 1816, have not been received, but still remain in the Bank of England:—That Petitioner conceives the Stock was purchased with the produce of the Bills remitted to *Hudson* by the Petitioner, and ought to be considered as his Trust Property, and that the Assignee of *Hudson* has no right to it. The Petition *Prayed*, That *Gabriel Gillett* (the Assignee of *Hudson* and the Petitioner, in the Petition first stated) might be restrained from receiving the 3,170*l.* and 636*l.* *Three per Cent. Consols*, standing in the name of *Hudson*, or the Dividends due or to become due thereon, and that the *Secretary of the Governor and Company of the Bank of England* might be directed to transfer the same to the Accountant General of this Court, in trust in this matter, to abide the further Order of the Court.

An *Affidavit* of *Bacon* was filed in support of his Petition.

The Petitions came on to be heard together.

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Sir *Samuel Romilly*, in support of the Petition by
the Assignes of *Hudson* :—

If it is clearly made out that the Stock, though unclaimed, and transferred to the Commissioners for the Reduction of the National Debt, belongs to an individual, he is entitled to claim it. Though the Bankrupt did not in his last Examination disclose this Stock, it does not follow he is not entitled to it. Either the Assignee of *Hudson*, or *Bacon*, is entitled to the Stock, and it ought to be transferred into the name of the Assignee, until an inquiry is made whose Stock it was. As the Claim of *Bacon* may depend upon presumptive evidence, it would be satisfactory that a Jury should decide upon it; but as *Hudson* is out of the Kingdom, it will be better to have a reference to the *Master*. The Stock should be transferred into the name of *Hudson's Assignee*, subject to the inquiry; interest will then be accumulating. The Act itself, I think, is objectionable in its Principle, and very objectionable also in this respect, that if the unclaimed Stock is transferred to the Commissioners for the National Debt, it is to be laid out, and the Dividends accruing thereon are, if any Claimant appears, to be paid, together with the Principal, to the Claimant; but the Interest arising from the investment of the Dividends as they arise, goes to the Commissioners for the Reduction of the National Debt. It is important, therefore, that the Money should be paid into Court.

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The *Solicitor General*, and Mr. *Mitford*, for the
Crown :—

A strong presumption arises that this was Trust Pro-

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perty, as the Bankrupt made no mention of it in his last Examination. If it was his, he has committed a Felony, by not disclosing it. If he was a Trustee of the Property, and it cannot be discovered for whom, it goes to the Commissioners for the Reduction of the National Debt. If *Hudson* was a mere Trustee of the Property, it did not pass under the Assignment to the Assignees, nor has the surviving Assignee any right to claim it. If *Bacon* cannot establish his right to the Money, it is claimable under the Act by the Commissioners for the Reduction of the National Debt.

Sir A. Pigott, for the Bank :—

In general, if unclaimed Stock is transferred to the Commissioners for reducing the National Debt, and a Person comes from abroad showing a just claim to it, the Bank transfer the Stock to him; but in this case, they did not think it proper to transfer the Stock either to the Assignee of *Hudson*, or to *Bacon*; but, as the Act enabled them to do, refused to act unless under the order of the Court.

Mr. Hart, and Mr. Montagu, for *Bacon* :—

As the Stock belongs either to the Assignee of *Hudson*, or to *Bacon*, there is no objection to having the Funds transferred into the name of the Assignee, subject to the Enquiry; or perhaps it would be more advisable to have the Money transferred into the name of the *Accountant General*, until it is ascertained to whom it belongs. A sufficient case is stated by *Bacon* to entitle him to the Enquiry.

The VICE-CHANCELLOR :—

Whether the Fund is transferred into the name of the *Accountant General*, or into the name of the Assignee,

must be a matter of indifference. The Provision in the Act entitling the Owner of the Fund to a Re-transfer, where the Funds have been transferred to the Commissioners for the reduction of the National Debt, means, the Owner who appears as such in the books of the Bank, the Person in whose name the Stock stands, or his Representatives; and the *Cestuis que Trust* of such Stock are not entitled to have the Funds re-transferred to them. Were it otherwise, the Bank might be involved in a variety of contested Petitions. *Hudson*, therefore, was entitled to have the Stock re-transferred to him, though it were true that he was a mere Trustee; but if he were a mere Trustee, his Bankruptcy did not entitle his Assignee to stand in his place and claim a Re-transfer. I cannot therefore order this Stock to be transferred to *Hudson's* Assignee, unless it be clear that it was *Hudson's* own Stock.

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Let it be referred to the *Master*, to ascertain whether this Stock was the Property of *Hudson*, or whether he was only a Trustee of it for *Bacon*. The Stock must be transferred into the name of the *Accountant General* of this Court, and the Costs of all Parties up to this time paid out of the Fund, and the *Master* may make a separate report as to the Costs.

These Petitions come on among the Cause Petitions, but they should be entitled, "In the matter of the Act to authorize, &c."

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Original Bill, by MOUNTFORD v. SCOTT, BLAKE
and WARNER; and

Supplemental Bill, by MOUNTFORD v. CORROCK
and JEYS.

24th January.

Notice to an Agent in order to bind his Principal, must be in the same Transaction; and this, though the Agent acted as Attorney for the Vendor and Vendee.

THE *Original Bill* stated, That Defendant *Scott* being indebted to Plaintiff in 190*l.* 15*s.* for Goods sold, and upon a Bill of Exchange, deposited with him, on the 10th April 1809, a Lease, 3d March 1809, from *Stapp* to *Scott*, his Executors, &c. of certain Ground for 78 years:—That at the time when the Lease was deposited, *Scott* was erecting and had nearly finished on the ground five houses, and he afterwards completed the same:—That afterwards the Defendant *Blake* requested *Scott* to make over to him the Leasehold Premises, towards satisfaction of his Debt to *Blake* of 400*l.*; *Scott* stated he could not comply with his request, as the Lease was deposited with the Plaintiff; *Blake* then applied to his Solicitor *Gyles* told him of the Deposit with the Plaintiff, and required his advice:—That in pursuance of his advice, it was agreed between *Scott* and *Blake*, that *Scott* should grant *Blake* an Underlease, which he did 16th of February 1810, of four of the Messuages, for all the term *Scott* had therein, except a few days, at a pepper-corn rent; the Consideration of such Underlease being stated to be 200*l.*; and it was agreed that *Blake* should sell such Underlease, and should advance *Scott* 50*l.* or 60*l.* out of the Purchase Money, to enable him to carry on his business:—That soon after the Underlease, the Defendant *Warner*

purchased the same from *Blake* for 275*l.*, and it was assigned by the latter to *Warner* in consideration of that sum. *Gyles* prepared the Assignment to *Warner*. The Bill, stating the foregoing facts, and charging that *Warner* had notice of the Deposit with the Plaintiff at the time of the Assignment to him, *prayed* an account of what was due to the Plaintiff, and that the Defendants, or some or one of them, might be decreed to pay to Plaintiff, by a short day, what, on taking such account, should appear to be due to him for Principal and Interest on the Security of such Indenture of 3d March 1809; and in default of payment, that the Defendants might be decreed to assign and convey to the Plaintiff all their Estate and Interest in the Lease of the 16th February 1810; and that such of the Defendants as should appear to have the Lease of the 16th of February 1810, and the Deed Poll indorsed thereon, in their possession or power, might be decreed to deliver up the same to the Plaintiff; and if it should appear that *Warner* had not, before the execution of the Assignment to him, and the payment of the Purchase Money for the same, any notice or reason to believe that said Indenture of 3d March 1809 had been deposited with the Plaintiff, then that Defendants *Scott* and *Blake*, or one of them, might be decreed to pay to the Plaintiff what should appear to be due to him for Principal and Interest, on the security of such Indenture.

By the joint and several Answer of *Scott* and *Blake*, (which as to the following passages was read), they admitted, "That *Scott* being indebted to Defendant *Blake* in the sum of 400*l.* and upwards for Materials

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which were principally used in building such four Houses, and for Money advanced to him, and being pressed by him for payment thereof, he, Defendant *Scott*, did of his own accord propose to execute to Defendant *Blake* a Lease of said four Houses, but not for the House which had been built prior to the deposit of the aforesaid Lease, in or towards satisfaction of the said Debt of 400*l.* and upwards; and he, Defendant *Scott*, at the same time, but not before, informed Defendant *Blake* of such Lease being deposited with the Plaintiff." *Blake* also, by his Answer admitted, "that before such Lease was granted to him by Defendant *Scott*, he had been informed of the said original Lease having been deposited with the Plaintiff as a security for a sum of Money due to him from Defendant *Scott*; but insisted such Lease so deposited with Plaintiff by Defendant *Scott* could only be considered as affecting the one House which was erected on the said piece of Ground at the time of depositing such Lease with Plaintiff, if the same could be considered as having effect at all." *Scott* and *Blake* afterwards, by their Answer, admitted his Assignment of the Lease to *Warner* for 285*l.* (not 275*l.* as stated in the Bill,) but denied any Agreement to pay part of the Purchase Money to *Scott*, on the sale to be made by *Blake*; and *Blake* admitted that he applied to his Attorney, *Gyles*, who advised him a good Title could be made to *Blake* of the four Houses, as the Lease deposited with the Plaintiff did not affect such four Houses, which had been erected after such deposit, but only the one House which had before been erected.

In a passage of *Warner's* Answer, read as Evidence,

2.

he admitted, that *Gyles*, at the time of the assignment to him by *Blake*, was his Attorney, and employed by him to prepare, and did prepare, the Deed of the 28th March 1810, and perused and approved of the same on his behalf, and as his Solicitor.

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On the part of the Plaintiff, *Gyles*, the Attorney, was examined, and the following passage of his Depositions read as Evidence:—"Saith, that he this Deponent was employed as the Attorney or Solicitor of *Robert Scott* and *James Blake* (two of the Defendants), to prepare the Lease of the 16th of February 1810; and saith, he this Deponent was not employed as the Attorney or Solicitor of the said Defendant *Charles Warner*, to prepare the Deed Poll of 28th March 1810; and that he, Deponent, did, as such Attorney or Solicitor, prepare the said Lease; and that he did, by the direction of *Blake*, prepare the said Deed Poll, and that he was before and at the time of the date or execution of said Indenture of Lease, and at or before the time of the date or execution of the said Deed Poll, informed by the Defendant *Scott*, that the original Lease to *Scott* was then deposited, or had been deposited, by *Scott* with the Plaintiff."

The Defendant *Robert Scott* was also examined by the Plaintiff, and deposed that the Lease to him, 18th April 1809, was deposited with the Plaintiff by him, for securing 130*l.* 18*s.*; and that that sum, with Interest, was due from him to the Plaintiff.

After the filing of the Original Bill, and the Answers put in, and a Replication, and several Witnesses examined, a Commission of Bankruptcy issued against

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Blake; and his Assignee, *William Jenks*, also became Bankrupt, and the Defendant *James Corrock* was his Assignee. The Defendant *Scott* also took the benefit of the *Insolvent Debtors Act* (a), and his Estate and Effects were assigned to *Robert Clarke*, who having resigned or been removed from his office of Clerk of the Courts for the relief of Insolvent Debtors in *England*, was succeeded by the Defendant *Jeyes*, to whom all *Scott's* Estate and Effects were assigned. A Supplemental Bill was therefore filed, making *Corrock* and *Jeyes* Defendants.

Sir *S. Romilly*, Mr. *Agar*, and Mr. *Parker*, for the Plaintiff:—

The deposit of the Lease with the Plaintiff, and the Debt due to him, is proved. It is in proof also, that *Blake*, when the Underlease was made to him, knew of the deposit; and though there is no proof that *Warner* had personally notice of the Deposit, yet he admits that *Gyles* acted as his Attorney in the Assignment of the Underlease to him; and as it is clear that *Gyles* knew all the transactions and the deposit of the Lease with the Plaintiff, his knowledge must affect *Warner*, for whom he acted as Attorney. All the notice which an Attorney has, affects his principal. *Gyles* was Attorney both to *Blake* and to *Warner*, Agent for Vendor and Vendee, and therefore all he knew was notice to his Employers. *Gyles*, it is true, denies that he acted as Attorney to *Warner*, but in that he is contradicted by *Warner* himself, who admits he acted as his Attorney in the Assignment from *Blake* to him. Besides, if a Person derives his Title through a Deed, he must be considered as having notice of that

(a) 54th Geo. III. c. 102.

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Deed, and the circumstances attending it. If *Warner* had inquired for the Original Lease, he would have found it was deposited with the Plaintiff, and he must suffer for his negligence. The knowledge which a Conveyancer may acquire has been held not to affect subsequent employers whose business may pass through his hands; but a Conveyancer is not like an Attorney: between the latter and his Clients, there is privity very different from that of a Conveyancer, who seldom sees the Person for whom he is employed. *Le Neve v. Le Neve* (*b*), *Sheldon v. Cox* (*c*), and *Heirn v. Mill* (*d*), were cited.

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Mr. J. Martin, for the Defendant *Jeyte*

Mr. Hart, and Mr. Wetherell, for the Defendant *Warner*, were stopped by

The VICE-CHANCELLOR:—

The Plaintiff has a lien against every one claiming under *Scott*, with notice of the Deposit. *Scott* made the Underlease to *Blake*, because he could not produce the Lease to him. *Blake* was made the instrument of a fraud upon the Plaintiff. He assigns his Underlease to *Warner*, who it is urged had constructive notice of the Deposit with the Plaintiff, as the Underlease states the Original Lease to *Scott* from *Stapp*, and that put *Warner* under the necessity of inquiry as to the Original Lease, which inquiry would have led him to a knowledge of the Deposit with the Plaintiff; and neglecting to make the inquiry,

(*b*) 3 Atk. 646. S.C. 1 Ves. sen. 54; and Ambler, 436. (c) Ambler, 624. (d) 13 Ves. 120.

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he must suffer by his negligence. But I think it was not *Warner's* duty to inquire what had become of the Original Lease, and that there is no imputation upon him for not inquiring. Such an inquiry is not usual in transactions of this nature. But then it is said that *Gyles* prepared the Underlease to *Blake*, and that he was employed to prepare the Assignment from *Blake* to *Warner*, and that when he so prepared such Assignment, he knew of the Deposit with the Plaintiff, and it was his duty to communicate his knowledge to *Warner*, and that *Warner* was bound by his knowledge. No authority is produced to that extent. The Agent stands in place of the Principal; and Notice therefore to the Agent is Notice to the Principal; but he cannot stand in the place of the Principal until the relation of Principal and Agent is constituted: and as to all the information which he has previously acquired, the Principal is a mere stranger. The Bill must be dismissed, but without Costs.

Mr. Joseph Martin, as Counsel for the Defendant *Jeyes*, the Provisional Assignee of *Scott* under the Insolvent Debtors Act, asked for his Costs, and mentioned the 13th Section of the Insolvent Debtors Act (f).

The VICE-CHANCELLOR:—

He must have his Costs under that Section of the Act, though *Scott* himself would not have been entitled

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| (e) See <i>Fitzgerald v. Fal-</i>
<i>conberg</i> , Fitzg. 211; <i>Warwick</i>
<i>v. Warwick</i> , 2 Atk. 294; <i>Low-</i>
<i>ther v. Carlton</i> , 2 Atk. 242; | <i>Worsely v. Earl of Scarbo-</i>
<i>rough</i> , 3 Atk. 392. |
| | (f) 54 Geo. III. s. 13. |

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to them; but as against the other Defendants, the Bill must be dismissed without Costs.

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MAINWARING v. WILDING.

24th January.

MR. HORNE moved on behalf of the Defendant, that he might have a Commission to take his Answer, and that the Plaintiffs might in two days after notice thereof, join in the Commission; or in default, that the Defendant might have such Commission directed to his own Commissioners.

The Defendant was in contempt for want of an Answer, and an Attachment issued against him, upon which, he was arrested, and was a Prisoner in the County Gaol of Salop.

A Motion may be made, without Consent, by a Defendant in custody, upon an Attachment, for want of an Answer, for a Commission to take his Answer, &c.

The VICE-CHANCELLOR:—

Should you not have a consent to this Motion?

Mr. Horne:—

In *Rogers v. Prince*, 8th June 1803, an Order for a Commission was granted to a Defendant in *Lancaster Goal* for a contempt, in not answering, and an Order was made, without Notice, that a Commission should go, on the Defendants paying or tendering to the Plaintiff's Solicitor, the Costs of the Contempt, and a reference to the *Master* to tax the Costs if the Parties differed. And in *Church v. Barclay*, July 1807, an Order for a Commission to take the Answer was granted to a Defendant in custody for a Contempt. These Cases are extracted from the *Register's Books*.

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WILDLING.**The VICE-CHANCELLOR:**—

Take the Order.

The Order, according to the *Register's Book* was, "that upon the Defendant's paying or tendering the Costs of the Contempt, he may have a Commission to take his Answer; and that the Plaintiff's Clerk in Court should, in two days after the notice of this Order, give the Defendant's Clerk in Court, Commissioners Names, to see the same taken; or in default, that the Defendant should have such Commission directed to his own Commissioners."

BROUGHTON v. JONES.

24th January.

After an Attachment for want of an Answer, the Defendant can only answer. THE Defendant had been attached for want of an Answer.

Mr. Trollope moved that the Attachment might be set aside, with Costs, to be paid by the Defendant, and that he might have a Commission to take his Plea, Answer, or Demurrer, not demurring alone.

Notice of the Motion was served, but nobody appeared on behalf of the Plaintiff.

The *Register*, on being applied to, observed, the late Vice-Chancellor had determined, that after an Attachment for want of an Answer, the Defendant could not put in an Answer and a Demurrer, but only an Answer; and that the *Lord Chancellor* on Appeal, confirmed his Decision.

The VICE-CHANCELLOR:—

The part of the Motion which asks that the Attachment may be set aside with Costs, is wrong. The Attachment cannot be set aside. You may have a Commission to answer, upon payment of the Costs of the Attachment, but you cannot have an Order for a Commission to plead, answer or demur. In ordinary cases, a Defendant may have a Commission to answer, without Motion or Order; but he is obliged to move for the special Commission to take his Plea, Answer, or Demurrer; and this special Commission is not granted after a Contempt.

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v.
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RIDIFER and others, v. O'BRIEN and others.

A BILL was filed against the Defendant as Executor, and usual Decree made for the Executor to account. *The Master by his Report stated* A Discharge was offered to the *Master*, which he did *he had not allowed*; stating in his Report the Sums paid, insisted on by way of Discharge, and that, “he had not allowed them as matters of Discharge, as no sufficient Evidence had been produced before him to warrant that allowance; but that he had received them as a *Discharge to the Executor, for want of Evidence, but had received a Claim. The Report was excepted to; and*

it was admitted the Evidence before the Master did not warrant the Claim, but that additional Evidence clearly established it.

Held, that to support the Exception, it must be shown that the Master ought to have allowed the Discharge, on the Evidence before him; and that if the Master refused to act upon the additional Evidence, a distinct Motion should be made for a direction that he should receive it.

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and others.

claim. An exception was taken to this part of the Report, and Sir *Arthur Pigott* began to argue the Exception, admitting there was no sufficient Evidence to warrant the allowance of the Discharge, but stating that additional Evidence was procured; from which it was clear the Discharge ought now to be allowed.

The VICE-CHANCELLOR:—

On this Exception, you cannot argue from the additional Evidence now in your possession; but to support the Exception, you must show me that the Evidence before the *Master* did not warrant him in reporting that he had not sufficient Evidence before him to allow the Discharge. The *Master* has admitted a Claim, and you must produce your additional Evidence before him.

Sir *Arthur Pigott*:—

The *Master* refuses to hear the additional Evidence. We request, therefore, that the *Master* may be directed to receive the additional Evidence.

The VICE-CHANCELLOR:—

I cannot, on overruling this Exception, direct the *Master* to receive the additional Evidence; but let the matter go back to the *Master*, and if he continues to refuse the additional Evidence, you may then make a distinct Motion that he should be ordered to receive it.

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WILSON v. METCALFE.

A BILL was filed to redeem Mortgaged Premises. The Mortgagee insisted that the Heir at Law of the Mortgagor, who was dead, was one *William Bentley*, and that he was not proved to be dead. By the Decree, it was referred to the *Master* to state, whether *William Bentley* in the pleadings named, was living or dead, and if dead, when he died, and who is or are his Heir or Heirs at Law, and whether he died intestate, or left a Will so executed as to pass Real Estates, &c.

The *Master* by his Report 26th January 1811, stated, *William Bentley* was dead, though he had not been able to ascertain the time of his death, and no Person having made any claim under any Will of his, or produced any evidence to show that he made any Will, and Administration having been granted to the Plaintiff, he was of Opinion that he died intestate, and *J. Bentley*, of, &c. was his Heir at Law.

Exceptions were taken to his Report, and on Argument, the *Master* was directed to review the same, and that he be at liberty to receive further Evidence.

The *Master* made his reviewed Report 16th February 1814, in which he continued of the Opinion expressed in his first Report, that *William Bentley* was dead, but he had not been able to ascertain the time of his death.

Exceptions were again taken to the Report, and on

28th January.
On a Bill to redeem, the Mortgagee insisted that W. B., the Heir at Law stated in the Bill to be dead, was alive. By the Decree, a reference was made to the Master, to ascertain whether he was dead. He reported he was dead. Exceptions were taken to his Report, and Master directed to review the same. In reviewed Report he continued of opinion W. B. was dead. Exceptions were taken to the same, and an Issue was directed whether W. B. was dead, &c. The Jury found he was dead. Exceptions were then over-ruled; and held, the Mortgagee ought not to pay the Costs of the Issue.

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v.
METCALFE.

the Argument of the same, 5th April 1814, His Honor (the late Vice-Chancellor (*a*), directed an Issue to try whether the said *William Bentley* was living or dead, and if the Jury should find the said *William Bentley* was dead, the time when he died to be indorsed on the *Postea*, with the usual directions.

The Issue was tried at the *York Assizes*, when the Jury returned a Verdict, finding *William Bentley* was dead on the 5th April 1814, the day mentioned in the Issue; but they could not find the precise time at which he died, and assessed the Damages at 1*s.*, and for Costs 40*s.*

The Cause now came on again upon the Exceptions, and the result of the Trial of the Issue being stated, the Vice-Chancellor overruled the Exceptions.

Sir *Samuel Romilly*, and Mr. *Daniell*, for the Plaintiff, asked for the Costs of the Trial of the Issue, which was very expensive; observing, that the objection on the part of the *Mortgagee* was vexatious.

Mr. *Trower*, contra.

The Vice-Chancellor:—

The Mortgagee must not pay the Costs of the Issue. He cannot be charged with vexation when the Court has thought there was so much weight in his objection as to direct an Issue. Let the Exception be overruled, without Costs, and the Deposit be paid to the Plaintiff.

(*a*) Sir *Thomas Palmer*.

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**BRIGSTOCKE v. STEPNEY MANSEL and
others.**23d and 29th
January.

THE Plaintiffs and some of the Defendants were entitled as the younger Children of the late Sir *Thomas Mansel*, under his Settlement, and the appointment of the late Lady *Mansel* to have Portions to the amount of 10,000*l.* raised out of a Term of 500 years. The Defendant Sir *William Mansel*, under the Settlement, was, subject to the Term, Tenant for life, and his Son, the Defendant *William John Mansel*, was Tenant in Tail. A Bill was filed to have the Portions raised, and a Decree was made in July 1816, that the Portions should be raised by means of the Term, and paid; and it was referred to the Master to enquire, whether a Contract entered into by Sir *William Mansel*, and *William John Mansel*, with the Defendant *Thomas Morris*, for the Sale of part of the settled Estates for the sum of 6,000*l.* was proper to be carried into execution; and it was Ordered, that if the same was proper to be carried into execution, that the same be carried into execution accordingly, and that the Purchase Money for the same might form a part of the sum so to be raised; and that the residue of such sums, together with the Costs of the Suit, should be raised by Sale of the remainder of the Estates comprised in the Term; but if the Master should find such Contract was not proper, it was ordered that the full sum of 10,000*l.*, and Interest and Costs, should be raised by such Sale. The Master reported the Contract was proper to be carried into execution, and his Report was confirmed; and by a subsequent Order, the Contract with

Limitation of a term for 500 years to raise Portions for younger Children, and afterwards Estate limited to T. M. for life, with Remainders over, and a Decree made to sell the Term for raising the Portions. T. M., the Tenant for life, refusing to produce the Title Deeds before the Master, and obstructing the Decree, an Order was made on Motion for a Receiver of the Rents and Profits of the Estate.

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and others.

Morris was directed to be carried into execution, and the Purchase Money to be paid into Court to the credit of the Cause. Sir *William Mansel*, however, the Tenant for life in Possession, had the Title Deeds, &c. relating to the Estate, and they could not be procured from him, by which means it became impossible to proceed to a Sale, and make out a Title. A Warrant was served upon him to bring the Deeds, &c. into the *Master's* Office, and he admitted he had the Deeds, but required time to bring them in. A Fortnight was given, but it expired without their having been brought in. The *Master* certified the default, and usual proceedings to compel the production of the Deeds, were in prosecution. *Morris*, the Purchaser, was willing to complete his Purchase, but declined paying his Money into Court until his Title was perfected.

Under these circumstances, Mr. *Hart*, and Mr. *Buck*, moved, that it might be referred to the *Master* to appoint a Receiver of the Rents and Profits of the Estates; observing, that the Decree having directed a Sale, and the 500 years Term being prior to the Life Estate of the Defendant Sir *William Mansel*, they were entitled to possession of the Estate, and that the Rents and Profits would be applied in reduction of the sum to be raised by the Sale. They also observed, that such an Order would most probably induce the Defendant to expedite the prosecution of the Decree.

This Motion was first made on the 23d, when the *Vice-Chancellor* directed it to stand over a few days, with liberty to Sir *William Mansel* to state any circumstances to account for his noncompliance with the *Master's* Warrant. On this day, 29th, the Motion

was renewed, nobody appearing on behalf of Sir William Mansel.

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The VICE-CHANCELLOR:—
Take the Order.

Ex parte GREGSON.

THE Petitioner was Solicitor to the Commission, and for the Assignees after the choice, and had a Bill of Costs against the Assignees in that character. He had also, by Special Agreement, collected Debts due to the Estate, for which he was to be allowed a Commission, and not to charge as a Solicitor.

He accordingly stated his Account of Debts so collected, and Money expended; and he also made out a Bill for Law Business actually done for the Estate; and retaining the amount of Commission, and his Bill of Costs, he paid the Balance to the Bankers of the Assignees. These Accounts were delivered to the Assignees, and laid before the Commissioners, and at a Meeting for a further Dividend in 1811, the attention of the Commissioners was particularly called to these Books and Accounts, and Mr. Cowley, one of the Assignees, desired they might be examined by the Commissioners; upon which it was agreed, that Mr. Cullen, one of the Commissioners, should take the Accounts and Bills home with him to examine them, and the Dividend was adjourned for the purpose. He accordingly examined the Accounts and Bills, and at

3d February,
*A Bill of Costs
by a Solicitor
under a Commis-
sion of Bank-
ruptcy, though
approved by the
Commissioners,
and stated and
allowed in the
Accounts of the
Assignees, held
to be Taxable
under 5th Geo. II.
c. 30, s. 46.*

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the adjourned Dividend, stated that he had done so, and that he thought the allowance of Commission and Law Charges very reasonable, and that the Estate was considerably benefited by Mr. Gregson's exertions. Before this, the Commissioners allowed the sums retained as items of payment in the Assignees Account, and Mr. Gregson's and the Assignees Account were verified upon Oath. During part of this time, Mr. Gregson had a Partner, Mr. Dickson, who during the Partnership principally managed the business of Bankruptcy. He died in 1814, and Mr. Gregson settled Accounts with his Executors. No attempt was made to disturb the Settlement of Accounts and Bills by the Commissioners until November 1817, when Mr. Cowley called upon Mr. Gregson to deliver his subsequent Bill, which was done. Cowley also required Copies of the former Account and Bill, which were furnished. He then, as a matter of course, applied at the Public Office for an order to tax the Bills generally, and was proceeding upon such Order; upon which Mr. Gregson presented a Petition to rescind the Order, except so far as it applied to the Taxation of the last Bill.

The short objection made to his Petition was, that by the 5th Geo. II. c. 30, s. 46, the Bill must be taxed, and that no examination or Settlement by the Assignees, or by the Commissioners, will satisfy the directions of the Act; and consequently that all the particular circumstances stated in the Affidavit, and which might have been good ground of objection to tax a Bill in a Cause or other proceeding, did not apply in Bankruptcy.

The Vice-Chancellor was of Opinion, that the Statute

was imperative, and upon that short ground dismissed the Petition. He said, if the Solicitor had done business as a General Agent by Contract, and not in his character of Solicitor, the *Master* would have no authority to take the Account or tax it as a Solicitor's Bill.

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*Ex parte
GEOSON.*

DE TASTET v. SHARPE and others.

THE Bill stated that, in 1810, the Plaintiff carried on the business of a Commission Merchant:—That in or before that year, Messrs. *Livio*, Merchants at *St. Petersburgh*, sent to this Country several large quantities of Pearl Ashes and other Goods for Sale on a *del credere* Commission, and the Goods were in the years 1810 and 1811 brought into the Port of *London*, the Bills of Lading being made to the Plaintiff or his Assigns, he or they paying the Freight:—That *George Sharpe* the Elder, and Defendants *George Sharpe* the Younger, and *William Sharpe*, in the years 1810 and 1811, carried on the business of Sworn Brokers, and were Members of the Russian Company, and that Plaintiff employed them as his Brokers for the purpose of entering and landing the Pearl Ashes and other Goods in the Port of *London*, and that they entered and landed the same in their own names at a Wharf in *Wapping*, called *Sharp's Wharf*, belonging to Messrs. *W. H. Sharp* and *J. Cottell*, who carried on the business of Wharfingers, and *G. Sharpe* the Elder, *G. Sharpe* the Younger, and *W. Sharpe* paid the Customs and other Charges upon the Pearl Ashes and other Goods,

4th February.
*Plea, of Certificate, allowed,
where the Plaintiff, before the
Bankruptcy, had a remedy by Assumpsit, and for
a Tort; the Bill being considered
as brought in lieu of the remedy by
Assumpsit, no Bill founded on a
Tort being sustainable.*

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and were repaid by the Plaintiff:—That the Pearl Ashes and other Goods were warehoused in *Sharp's Wharf* in the names of *G. Sharpe* the Elder, *G. Sharpe* the Younger, and *W. Sharpe*, as the Brokers of the Plaintiff, and Plaintiff directed them to sell the same as the Brokers of the Plaintiff, and to draw Bills of Exchange on the Buyers to the Order of the Plaintiff, but that they were not able to find Purchasers for the Pearl Ashes and part of the other Goods, and thereupon Plaintiff directed *G. Sharpe* the Elder, *G. Sharpe* the Younger, and *W. Sharpe*, to sell the same by Public Auction, and accordingly, on the 21st July 1812, they put up the same to Sale by Public Auction:—That all the Pearl Ashes were not sold:—That all the other Goods were sold, and the Pearl Ashes and Goods sold delivered to the Purchasers:—That *Sharp* and *Cotchell*, in pursuance of a written Order, 21st September 1812, from *G. Sharpe* the Elder, *G. Sharpe* the Younger, and *W. Sharpe*, transferred in their Books 434 Casks of Pearl Ashes into the names of *S. Walker* the Elder, *S. Walker* the Younger, and *Ostin Walker*, Hemp Merchants; but the same remained at *Sharp's Wharf* until October 1812, unweighed, and in the same state as they were in when first landed and warehoused:—That *G. Sharpe* the Elder, *G. Sharpe* the Younger, and *W. Sharpe*, represented to the Plaintiff, that all the Pearl Ashes and other Goods had been sold at the Sale by Public Auction, and in consequence, on the 28th July 1812, the Plaintiff advised the firm of Messrs. *Livio* that all the Pearl Ashes and other Goods were sold; and on the 14th August 1812, *G. Sharpe*, the Elder, *G. Sharpe* the Younger, and *W. Sharpe*, transmitted to the Plaintiff three Statements in writing, signed by them, purporting to be an Account of the

Sale of the whole of the Pearl Ashes and other Goods, and the net Proceeds after all deductions:—That though in said Statements they gave credit for the net Proceeds of the Sale of the whole of the Pearl Ashes and other Goods, yet that in fact 434 Casks of Pearl Ashes were not sold, but bought in by and on behalf of *G. Sharpe the Younger*, and the residue was bought in by *W. Sharpe*, or on his behalf, or on their accounts or account, or on the account of the Firm, which was fraudulent and void against the Plaintiff:—That the affairs of *G. Sharpe and Sons* were in September 1812 embarrassed, and that in that Month, or before, said *Walker and Co.* had dealings with *Sharpe and Sons* as Brokers for them, and other dealings with *Sharpe and Sons* incompatible with their duty as Sworn Brokers, and *Walker and Co.* had advanced them Monies, and that *Sharpe and Sons* pledged said 434 Casks of Pearl Ashes as a Security, although they had no right to do so, and that the Plaintiff's Interest in the Goods was not prejudiced by such Pledge, and that the Order of the 21st September 1812 was in order to make such Pledge:—That the Plaintiff sent the aforesaid Statement of *Sharpe and Sons* to Messrs. *Livio*, and Plaintiff stated in his Account, Sales of the *Pearl Ashes* and other Goods, a loss of 3,260*l.*, besides the Cost Price, for which loss the Plaintiff debited them, and Plaintiff was repaid by them:—That *Sharpe and Sons* stopped payment in 1812, and then the Plaintiff discovered that the 434 Casks of Pearl Ashes had not been sold, but pledged with the Defendants *Walker and Co.*, and that such nominal transfer as aforesaid had been made; and that on the 25th September 1812, he caused a Notice to be served on *Sharpe and Cotchell*, informing them that the 434 Casks of *Pearl Ashes* then in their

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Warehouse, though entered in their Books as belonging to *Sharpe and Sons*, were in fact the Property of the Plaintiff, and desiring them not to deliver the same to any Person without the order of the Plaintiff; and thereupon, by order of the Plaintiff, Padlocks were put upon the Warehouse where the *Pearl Ashes* lay, and they delivered the Keys to the Plaintiff:—That afterwards, 25th September 1812, *Walker and Co.* put Padlocks on the Warehouse, and refused to allow the Wharfingers to deliver the 434 Casks of *Pearl Ashes* to the Plaintiff, whereby he lost the Sale of the same at advantageous prices:—That on the 1st October 1812, a Commission of Bankruptcy issued against *Sharpe and Sons*, upon which they were found Bankrupt, and Assignees chosen:—That soon after the Bankruptcy, *Walker and Co.*, in collusion with the Assignees of *Sharpe and Sons*, by some means gained admittance to the Warehouse in which the *Pearl Ashes* were, and took possession of them; and in June and October 1813, sold them, and received the Proceeds under the pretence that they had a lien on them:—That notwithstanding the 434 Casks of *Pearl Ashes* were only pledged to *Walker and Co.*, they delivered an Account to the Assignees of *Sharpe and Sons* as if the same had been sold to them by *Sharpe and Sons*, and admitting a balance due to the Estate of *Sharpe and Sons* of 1,128*l.* which they are ready to pay on having a proper acquittance from the Assignees:—That Plaintiff has a lien in respect of such 434 Casks of Pearl Ashes, if it is necessary to resort to such lien, and that *Walker and Co.* ought to be restrained from parting with such Balance:—That an Action has been brought by the Assignees of *Sharpe and Sons* against *Walker and Co.* for the Balance admitted due from

them to the Estate, and that they ought to be restrained from proceeding in such Action:—That *Sharpe and Sons* have or claim an Interest in the matters in question. The *Prayer* of the Bill was, That the rights of the Parties to the Pearl Ashes might be ascertained and declared, and that it might be declared that *Walker and Co.* had no lien upon the 434 Casks of *Pearl Ashes* or the Proceeds, and that an Account might be taken of such Proceeds, and what should appear due on such Account might be paid to the Plaintiff; and that in case the Court should be of Opinion that the Plaintiff is not entitled to such Proceeds as against *Walker and Co.*, that it might be declared that Plaintiff has a lien upon the Balance due from them to the Estate of *Sharpe and Sons*; and that *Walker and Co.*, *G. Sharpe* the Younger, and *W. Sharpe*, might make good to the Plaintiff the Loss and Damage he has sustained by the detention of the 434 Casks of *Pearl Ashes*, and that the amount thereof might be ascertained, and that in the mean time the Assignees of *Sharpe and Son* might be restrained from further proceedings in the Action against *Walker and Co.*, and that *Walker and Co.* might be restrained from paying the same to them, and that if all or any part of such Balance had been received by the Assignees of *Sharpe and Co.* that they might answer for the same to the Plaintiff.

To this Bill, the following Plea, Answer, and Disclaimer, was put in by *G. and W. Sharpe*.

The Defendants, &c. "Plead respectively to so much of the said Bill as seeks that Defendants might make good to the Plaintiff, the Loss and Damage alledged

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to have been sustained by him by the detention of the 434 Casks of Pearl Ashes in the said Bill of Complaint in that behalf mentioned, and that all necessary directions might be given to ascertain the amount of such Loss; and for Plea thereto, and for all the discovery sought from these Defendants with relation thereto, or to any other matters in the said Bill contained, except as to the question, Whether these Defendants, or one, and which of them, have not or hath not, or do not or doth not, claim some, and what Interest in the matters in question in this Cause, these Defendants say, that by a Statute or Act of Parliament made and passed in the 5th Year of his late Majesty King George II., and afterwards made perpetual, intituled, "*An Act to prevent the committing of Frauds by Bankrupts,*" it is amongst other things enacted, that all and every Person and Persons so become or to become Bankrupts as in such Act aforesaid, who should within the time thereby limited, surrender him, her, or themselves to the acting Commissioners named and authorized in or by any Commission of Bankrupt, awarded or to be awarded against him, her, or them, as in and by the said Act directed, should have certain Allowances, in the said Act in that behalf particularly mentioned, out of the net produce of their Estate; and every such Bankrupt should be discharged from all Debts by him or them due and owing at the time that he, she, or they did become Bankrupt; and that in case any such Bankrupt should be afterwards arrested, prosecuted or impleaded, such Bankrupt should and might Plead in general, that the cause of such Action or Suit did accrue before such time as he, she, or they became

Bankrupts, and might give the said Act and special matter in Evidence:—Aver that they did respectively become Bankrupt since the period in the said Act referred to, for the commencement of the operation and effect thereof, and that a Commission of Bankrupt under the Great Seal of *Great Britain*, bearing date at *Westminster*, the 1st day of October 1812, was awarded and issued against them, together with *G. Sharpe* the Elder, deceased, their late Father and Co-partner in Trade, under which Commission they these Defendants, and the said late *G. Sharpe* the Elder respectively, were duly found and adjudged Bankrupt; and that these Defendants, and each of them, did within the time limited for that purpose by the said Act, surrender themselves to the acting Commissioners named and authorized in or by the said Commission of Bankrupt so awarded against them, and the said *G. Sharpe* the Elder; and that these Defendants, and each of them, did in all things conform as in and by the said Act is directed:—Aver that the said Cause of Action or Suit in the said Plaintiff's Bill set up against these Defendants, and each of them, did accrue before such time as these Defendants respectively became Bankrupt; and therefore these Defendants severally crave the benefit of the said Act, and plead the same in bar to the relief and discovery (except as before excepted) so sought against them respectively by the said Bill of Complaint, and pray the Judgment of this honourable Court, whether they, or either of them, should be compelled to make any other or further Answer to the Plaintiff's said Bill of Complaint, save only as to the part thereof above excepted out of this their Plea; and these Defendants, not in any sort waiving their

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said Plea, do for Answer to such said excepted point or question put to them in the said Bill of Complaint, and not covered by their said Plea, or to so much of such question as they are advised is material or necessary for them to make answer unto,—Say, that by a certain Deed Poll under the Hands and Seals of these Defendants, and the said late *G. Sharpe* the Elder, deceased, dated the 26th July 1813, these Defendants and the said late *G. Sharpe* the Elder, in consideration of 5s. paid them respectively by the Assignees of their Estate, released to the said Assignees all surplus allowance, right, title, interest, benefit, claim and demand which these Defendants and the said *G. Sharpe* the Elder, deceased, or any or either of them, could or might have, claim, challenge, or demand, in, to, or out of their Estate, or against the said Assignees personally in respect thereof, both at Law and in Equity; and therefore, in case these Defendants ever had, claimed, or pretended to have or claim, an Interest in the matters in question in this Suit, such Claim and Interest would, as they are advised, be now extinguished or transferred wholly to their said Assignees:—Say they do not know or believe that since their said Bankruptcy, they or either of them have had, claimed, or pretended to have or claim, any Interest in the matters in question in this Cause, and they do respectively disclaim all Right, Title and Interest therein, and in every part thereof.”

Mr. Hart, and Mr. Wilson, in support of the Plea:—

This is a Plea according to the Statute 5th Geo. II. c. 30. The Certificate is pleaded in the same way at Law; and the Allegation in the Bill, that *Sharpe*

and Sons claim an Interest in the matters in question, is met by the Disclaimer. If in point of form the Plea were bad, yet if good in substance, the Court would permit an Amendment of it. We have mentioned the part of the Bill to which we answer, and that is an allowed mode of pleading, as appears from *Hicks v. Raincock* (a).

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The VICE-CHANCELLOR:—

There is no objection to that mode of pleading.

Argument continued.

This was a Debt which might have been proved under the Bankruptcy, and the Certificate is therefore a bar. When a Party has an election of two remedies, and may bring an Action of Assumpsit, or for a Tort, he may prove under the Commission. *Johnson v. Spiller* (c). This is not the case of personal damage, as for an Assault, Slander, &c. where no Debt can be proved, unless the Damages are liquidated before the Commission; here the measure of the Damages must be the value of the Goods. By coming into Equity, it must be concluded that the Plaintiffs waived their remedy as for a *Tort*, and are therefore barred by the Certificate.

Mr. Bell, contra:—

At Law the Certificate is pleaded as it is done in this Case; but in Equity, something more is required; there ought to have been a positive averment that the Debt accrued before the Bankruptcy, and that aver-

(a) 1 Cox, 40.

(c) Doug. 167.

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ment supported by an Answer. In an Action of Assumpsit, we could only have recovered against *Sharpe and Sons* as Vendees of the Goods; but we say no Sale at all took place, and that we could bring no Action of Assumpsit before the Bankruptcy. We put a Padlock on the Warehouse containing the Goods, and the Goods were taken away and converted into Money by *Walker and Co.*, subsequently to the Bankruptcy. In *Johnson and Spiller*, the Plaintiff might have brought Assumpsit or Trover, because the Money was received before the Bankruptcy; but the Plaintiff here, could not have recovered in Assumpsit. We ask an Account of the Sale by *Walker and Co.*, whose acts were the acts of the *Sharpes*, which Sale was subsequent to the Bankruptcy, and that if *Walker and Co.* do not pay, *Sharpe and Sons* may. We were entitled to a discovery from the *Sharpes*, of the Transactions, and that forms an objection to the Plea.

The VICE-CHANCELLOR:—

9th February.

This Bill presents the case of a fraudulent combination between the *Sharpes*, and *Walker and Co.*, to obtain the Property of the Plaintiff, and an Action in respect of the Tort might have been brought at Law against the *Sharpes* and *Walker and Co.*; but the amount of the Damages in such Action being uncertain, the Plaintiff could not prove under the Commission against the *Sharpes*. The Plaintiff might have waived the Tort, and affirming the Sales made to unknown Persons by *Walker and Co.* of the Plaintiff's Goods, have brought an Action for Money had and received against the *Sharpes*, or against *Walker and Co.* To a proceeding at Law, in respect of the Tort, the

Certificate is no bar ; but if Assumpsit is brought, the Certificate is a discharge. Is then this Bill analogous to the remedy for a Tort, or to the remedy by Assumpsit ? A Bill to obtain in this Court a remedy founded on a Tort, is not sustainable ; though, *incidentally*, relief has been given in respect of a Tort(c). This Bill is analogous to the remedy by Action at Law for Money had and received ; and must be considered as brought in lieu of that Action ; and, consequently, the Certificate is a bar. The Plea, therefore, must be allowed.

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Plea allowed

(b) See Winchester v. Mayor of York v. Pilkington, Knight, 1 P. Wms. 407 ; and 2 Atk. 302.

MITCHELL v. BAILEY.

5th February.

ON the coming on of this Cause to be heard, Mr. Wilson, as Counsel for the Defendant, objected there was a want of Parties, and it was admitted the Cause must stand over, with leave to amend, by adding the necessary Parties. The Answer of the Defendant did not state the objection for want of Parties. Mr. Wilson asked for the Costs of the day.

Cause on coming on to be heard, directed, on an Objection made by the Defendant's Counsel, to stand over for want of Parties, with liberty to amend, but Defendant was refused the Costs of the day, his Answer not stating the objection for want of Parties.

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The VICE-CHANCELLOR:—

As the Answer did not state the want of Parties, you are not entitled to the Costs of the day (a).

VIGRASS and another, v. BINFIELD and another.

6th February.

Executor, by Schedule to his Answer, acknowledging that he had received the Testator's Property, and lent it on a Promissory Note, ordered to pay the Money into Court.

MR. WINGFIELD moved for the payment into Court by the Defendants, as Executors, of a Sum in their hands, as appeared in the Schedule annexed to their Answer, and in particular of a Sum of Money, part of their Testator's Estate, which they had lent upon a Promissory Note.

Mr. Heald, *contra*, said they ought not to be called upon to pay into Court, Money thus lent, and upon which Interest was paid.

(a) That when a Cause stands over for want of Parties the Plaintiff pays the Costs of the day, was held by Lord Hardwicke in two Cases, *Anon.* 2 Atk. 14, and *Jones v. Jones*, 2 Atk. 109; but this general rule is qualified, as in the principal Case, and as the Reporter is informed, the late *Master of the Rolls*, Sir William Grant, held the same doctrine.

In a MS. Case, *Anon.* 23d Geo. II. 1749, where a Bill was dismissed, to which the Defendant might have demurred, but did not, it was held he was not entitled to Costs; a decision which seems founded on the same principle—the unnecessary expence and delay occasioned by the Defendant's mode of defence.

The VICE-CHANCELLOR:—

The point is settled (*a*). He admits that he has possessed the Property, and he cannot protect himself from the payment of the amount into Court, by alledging an improper application of it.

Mr. *Heald* requested time for the payment of the Money.

The VICE-CHANCELLOR:—

As Insolvency is not suggested, or any danger as to the Money, let it be paid in, with Interest, on or before the first day of next Term.

(*a*) See *Wilkes v. Steward, Coop.* 6. The doctrine expressed by Lord *Northington* in *Harden v. Parsons* (1 Lord *Northington's Rep.* p. 145) has not been followed.

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another,
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BINFIELD and
another.

Ex parte SMITH, in re BAKEWELL the Elder and BAKEWELL the Younger.

9th February.

THE Petition stated that, previous to the issuing of the Commission against the *Bakewells*, they carried on the business of Soap and Glue Manufacturers in Co-partnership, which, before such Co-partnership, had been carried on by *Bakewell* the Elder, on his own separate Account:—That no Articles of Partnership in writing were entered into by the *Bakewells*, but the terms agreed and acted upon, between the Bankrupts,

pay a Rent in proportion to his Share of the Business.

The Manufactory and Utensils were insured in the name of A. They were subsequently consumed by Fire, and afterwards a Commission issued against A. and B. Held that, the Insurance Money formed part of the separate Estate of A., and was unaffected by the 21st Jas. I. c. 29;

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were, that the Manufactory and Premises (which were Leasehold) where the Business was carried on, and the Utensils used therein, which were of great value, should remain the separate Property of *Bakewell* the Elder; and the Manufactory and Stock in Trade and Utensils having been consumed by Fire, a Commission of Bankruptcy, April 1815, issued against *Bakewell* the Elder and *Bakewell* the Younger, and Assignees were appointed, who received the Money for which the Premises, Stock, and Utensils were insured, or so much thereof as it was considered they were entitled to receive for the Damage sustained, the whole of which Money the Assignees intend to distribute amongst the joint Creditors of the Bankrupts, notwithstanding the Money received by the Assignees for the Insurance of the Manufactory and Utensils was the Separate Property of the Bankrupt *J. Bakewell* the Elder:—That the Commissioners have declared a Dividend of 6*s.* 8*d.* in the Pound to the Joint Creditors, and there is now remaining in the hands of the Assignees, to divide amongst the separate Creditors of *Bakewell* the Elder, the amount of his separate Estate claimed by them, and that the Assignees had notice of the claim of the separate Creditors before the first Dividend was declared. The *Prayer* of the Petition was, That the Money now in the hands of the Assignees of the Bankrupts, arising from the Sale of the said Manufactory and Utensils of *J. Bakewell* the Elder, and also the Money received by the Assignees for the Insurance thereof, might be divided amongst the Petitioner, and all other the separate Creditors of *Bakewell* the Elder; and that if it shall appear that the Assignees have applied any part of the separate Estate of *Bakewell* the Elder in payment of the joint Creditors, or

towards the expenses of the Commission, that the same may be repaid and made good out of the Joint Estate of the *Bakewells*; and that the separate Creditors of *Bakewell* the Elder, may be at liberty to choose one or more Person or Persons in the nature of an Assignee or Assignees, to act for their benefit, and on their behalf.

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The Petition was supported by Affidavit.

Mr. Cooke, for the Petition :—

The Manufactory and Utensils were, by agreement between the Parties when the Partnership was entered into, to be the separate Property of *Bakewell* the Elder, and *Bakewell* the Younger was to pay 50*l.* a year by way of Rent, being in proportion to his Share of the Business. The Manufactory and Utensils were burnt some time before the Bankruptcy, in April 1815. The 21 Jas. I. c. 29, does not apply to the Manufactory, and as to the Utensils, they not being in the possession, order, and disposition of the Bankrupts at the time of the Bankruptcy, the joint Creditors of *Bakewell* the Elder are entitled to the Insurance Money.

Mr. Cullen, contra :—

These Utensils were in the joint Possession of the Bankrupts when the Fire happened, and the Fire occurring before the Bankruptcy, cannot be considered as defeating the rights of the Creditors under the Statute of *Janes*. The Assignees were entitled to claim the Insurance Money, and have a right to distribute it amongst the Joint Creditors. He cited *Darby v. Smith* (a)

(a) 8 T. R. 82.

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Mr. Cooke, in Reply :—

The Case of *Darby v. Smith* has not been followed (b).

The VICE-CHANCELLOR :—

Permitting the Utensils to be used in the Joint Trade was a visible Possession of both Parties, under the Statute of James; but such visible Possession must continue until the Bankruptcy, to make that Statute of avail to the Joint Creditors (c). The Fire was previous to the Bankruptcy. When the Fire took place, the visible Possession was gone, and consequently no such Possession continued up to the Bankruptcy. In *Darby v. Smith*, there was a withdrawing of the Property by the Trustee, in contemplation of Bankruptcy; but Property may be withdrawn by the Owner of it at any time before the Bankruptcy, provided it is done *bona fide*. The Petition must be granted; the Costs of it to be paid out of the separate Estate.

(b) See *Joy v. Campbell*, (c) See *Jones v. Dwyer* 15
1 Sch. and Lefr. 338. East, 21.

MAZARREDO v. MAITLAND.

9th February.

Original Bill filed, and Answer put in. The Bill was amended, stating a new Case, but containing some of the same Interrogatories as were used in the Original Bill. Held, on Exceptions to Answer to the amended Bill, that a new Case being made by that Bill, that the Interrogatories must be answered, though some were the same as in the Original Bill.

procure and supply the Plaintiff and his Partners with Woollen Goods from the Manufacturers, of the best quality, at Six Months Credit, and at the lowest prices at which they could obtain the same; and that the Plaintiff should not be charged with a greater price for such Goods than was paid by the Defendants; and that the Defendants should not be allowed any greater Commission, in respect of such Goods, than the Commission they usually charged to the Manufacturer for selling such like Goods in their Warehouse; and that such Commission should be the only allowance to be made by the Plaintiff and his Partners to the Defendants. The Bill then in substance stated, the Plaintiff and his Partners had been charged more for the Goods than the Manufacturers prices, and that they were of inferior quality and less in quantity than they ought to have been; and the Defendants were interrogated as to the Agreement, and the names of the Manufacturers, their place of Residence, and the price for which the Goods were purchased from the Manufacturers by the Defendants; and the amount of their Commission, and whether the Goods were not of an inferior quality, &c.; and the Bill *prayed* an Account, (the Plaintiff offering to pay what should be found due,) and that the Agreement might be delivered up, and for an Injunction in the mean time.

The Defendants, by their Answer, denied the terms of Sale stated in the original Bill, and stated the Sales to the Plaintiff as made in the usual way of business, and insisted the Plaintiffs had no right to call upon them to set forth the names of the Manufacturers, or the places of their Residence, or an Account of the prices for which they purchased the Goods of the Manufacturers; but they admitted they sold the Goods

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to the Plaintiff for a greater price than they purchased them for of the Manufacturers, and insisted they had a right to do so, in order to obtain a fair profit upon the Goods.

No Exceptions were taken to the Answer.

The Plaintiff afterwards amended his Bill, striking out, amongst other matters, the Agreement stated in his original Bill, and the Interrogatories as to the existence of such Agreement, and stating only an Agreement to purchase Goods of the Defendants for certain adventures and speculations, and that the Defendants charged for them as Goods of a superior quality, and at very high prices, though they were of inferior quality and deficient in quantity; and a charge was introduced, that the Plaintiff was unable to defend himself at Law, without a discovery of the Bills of Parcels or Invoices under or by which the Defendants purchased the Goods of the Manufacturers, and of the evidence of the Manufacturers, &c., and interrogating the Defendants (as they did in the original Bill) whether such manufactured Goods had not been purchased by the Defendants from some, and what other Persons, and at what prices.

The *Answer* to the amended Bill answered the facts stated in that Bill, except as to such facts as were before stated in the original Bill, and to which they had before put in an Answer, to which Answer they referred.

To this Answer, twenty-six Exceptions were filed

The *Master* allowed some of the Exceptions, and in

particular, the second Exception, and others, that depended on the same point as the second Exception.

Exceptions were taken by the Defendants to the *Master's Report*, in respect of the Exceptions which he had allowed. The second Exception the *Master* allowed, on which the subsequent Exceptions depended, ran thus, "For that the Defendants have not set forth from what other Persons such manufactured Goods as are in the Bill mentioned, had been purchased by the said Defendants, or one and which of them."

Sir Samuel Romilly, and Mr. Parker, in support of the Exceptions to the Master's Report:—

If a Bill be filed, and an Answer put in, and without Excepting to such Answer the Plaintiff amends his Bill, he is not entitled to a further Answer to facts inquired of by the original Bill. An Answer not excepted to, is considered as a sufficient Answer, and after amending his Bill, the Plaintiff loses his right to except. The Defendants have answered the new matter introduced by the amended Bill; but they are not obliged to answer as to facts stated in the original Bill, though re-stated in the amended Bill. They had one Answer to those facts, which they admitted to be sufficient, because they did not except to the Answer, and cannot, by their amended Bill, call for another Answer to the same facts.

Mr. Bell, contra:—

As they have answered part of the amended Bill, they must answer the whole. The Amendments have made a new Case. In the original Bill, the Plaintiff stated an Agreement by the Defendants to sell at the Manufacturers price. The Defendants denied that

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Agreement, and submitted they were not bound to answer as to what they purchased the Goods for of the Manufacturers, or what were their names; as they denied the Agreement, we did not think it worth while to insist, as we might have done, on their answering as to the Manufacturers names and the prices, so that an Answer was not really given to those facts. I admit, in general, that after amending a Bill, Exceptions cannot be taken to the Answer to the original Bill; but by this amended Bill, a new Case is made; and in support of that Bill, it becomes important they should answer who the Manufacturers were, and for what they sold.

The Vice-Chancellor:—[After stating the facts of the Case:—]

The second and subsequent Exceptions turn on one principle. The Answer to the original Bill was good in substance, but not in form; because a Defendant cannot by Answer object to answering, though by Plea he may. That point was much considered in *Sommerville v. Mackay* (a); it is not expressly decided there; but, I remember, during the Argument, the *Lord Chancellor* strongly expressed his Opinion, that a Defendant could not answer as to part of a Bill, and refuse to answer the rest; and I think that is so useful a Rule, that I shall always adhere to it (b): but then the Plaintiff amends his Bill, which is a clear acknowledgment of the sufficiency of the Answer to the Original Bill. Many of the Interrogatories in the amended Bill are

(a) 16 Vesey, 382.

Cases on this point are collect-

(b) In various subsequent Cases, *His Honor* reiterated this doctrine. The previous

ed 2 Madd. Prin. and Pract. 266, &c.

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the same as in the Original Bill; and in general, a Defendant is not bound to answer any Interrogatories in an amended Bill, which are the same as were used in the original Bill, to which an Answer was put in and admitted to be sufficient (c); but if the Plaintiff, in his amended Bill, states a new Case, he may call upon the Defendant to answer Interrogatories contained in the original Bill, because, though the Answer given to the original Bill, upon the Case there stated, might then have been considered as sufficient, yet it may not be sufficient considered with a view to the new Case made by the amended Bill.

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The amended Bill no longer states an Agreement to sell at the Manufacturers price; but adopting the language of the Answer to the original Bill, and stating an Agreement to sell at a fair price, it states that an exorbitant price was charged; and to sustain that allegation, the Plaintiff requires to know who manufactured the Goods, and for what they were sold to the Defendants.

The Court is not now to consider whether the Plaintiff has shown a Case for equitable relief; the only question now is, as to the sufficiency of the Answer.

If the Sale was at an exorbitant price, it is material to know who was the Manufacturer, and at what prices he sold. The inquiry is auxiliary to the main point on which the Plaintiff places his Case.

(c) So held also in *Seeley v. Boehm*, by the Vice-Chancellor,

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A Defendant cannot by Answer deny the Plaintiff's Title, and refuse to answer as to facts which may be useful evidence in support of that Title. He cannot answer in part; if he answers at all, he must answer the whole of the Bill.

The point is new, but my Opinion is, that the Plaintiff having made a new Case by the amended Bill, the Defendant is bound to answer all the Interrogatories, though some of them are repetitions of the Interrogatories in the original Bill, and have before been answered, because the further answer is made material by the new Case; and that the second Exception, together with the subsequent Exceptions to the *Master's Report*, must be overruled (*d*).

(*d*) In general, when an original Bill has been answered, and is afterwards amended, the Defendant cannot put in a Demurrer; but if by the Amendments a perfectly *new Case* is made, the Defendant may demur (*Atkinson v. Hanway*, 1 Cox, 360). As therefore the Defendant in such case has the privilege of making a new Defence, as if a new Bill were filed; it seems but reasonable that the Plaintiff should have all the same rights as he would have had if he had filed a new Bill.

The only question, perhaps, is as to Costs. If the Plaintiff had proceeded on the original Bill, he must have paid the Costs; but suppose the Plaintiff succeeds on the new Case made by the Amendments, is he to have the Costs of the original and amended Bill? That it seems would be in the discretion of the Court, which might give the Defendants the Costs of the original Bill, and, if the amended Bill was well founded, make them pay the Costs of that Bill.

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FLETCHER v. WALKER.

10th February.

MARY WEST, by her Will, bequeathed two Dwelling Houses to her Executor, the Defendant *Walker*, to sell the same, and apply the produce in payment of her Debts, and to place the residue upon Real or Government Security, at Interest, in his own name, and apply the Interest amongst his three Nephews, *Richard West, John West*, and the Plaintiff, until they attained twenty-one, and then to divide the Principal among them. *Walker* sold the two Houses for 130*l.*, out of which he applied 22*l.* 16*s.* 1*d.* in part payment of the Testatrix's funeral and testamentary Expenses; and on the 17th May 1814, placed the residue, 107*l.* 5*s.* 11*d.*, in his Bankers hands, to remain there for safe custody until the 16th of October following, when the Plaintiff would attain twenty-one; not thinking it worth while to invest the Money in the Public Funds or upon Real Security for such a short space of time, and more particularly as the Plaintiff had caused notice to be given to the Defendant *Walker*, that he should insist upon the payment of his Share immediately upon his attaining twenty-one. The Bankers became Bankrupts on the 30th June 1814. At the time of the Bankruptcy, the Defendant *Walker* had not only the 107*l.* 5*s.* 11*d.* in the Bankers hands, but also Monies of his own.

Testatrix directed her Executor to sell two Houses, and invest the produce (after payment of her Debts) in Real or Government Securities, and to pay the Interest to her three Nephews until they attained twenty-one; and as each attained that Age, to have one-third of the Principal. The Executor sold the Houses, and applied part in payment of Funeral Expenses, &c. and paid the rest into his Bankers hands, mixing it with his own Money. The Bankers failed; and held, he was liable to pay the Money to the Legatees.

The question was, Whether the Defendant was responsible to the Legatees for the loss of the 107*l.* 5*s.* 11*d.* occasioned by the failure of the Bankers?

Sir Samuel Romilly, for the Plaintiff.

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Mr. Barber, for the Defendant.

The VICE-CHANCELLOR:—

The Defendant was directed by the Will to invest the produce of the Houses in Government or Real Securities; instead of doing so, he places the Money in a Banker's hands, not appropriating it to the account of the Legatees, which might make a difference, but placing it generally in their hands, with other Monies of his own. Under these circumstances, he must bear the loss occasioned by the failure of the Bankers. He had no excuse for placing it in their hands; the Testatrix's Debts were all paid. He says he placed it there in May 1814, because the Plaintiff would be of age in the following October, and had intimated that he should want his Share immediately; but even this excuse fails, because the other two Nephews, Legatees with the Plaintiff, were, and still are, under Age. He must pay the 107*l.* 5*s.* 11*d.*, with Interest. I shall not give the Defendant his Costs; but I shall not make him pay Costs.

FARR v. PEARCE.

10th February.

*F. on entering
into Articles
of Partnership,
with B., paid a
Premium; F.*

dies. After his Death, B. sold the Good-will of the Trade. Held, on the construction of the Articles, that the representative of F. was not entitled to a Share of the Money for which such Good-will sold.

Sensible, On a Partnership between Professional Persons, the Good-will of a Business, on the death of one, survives.

as a Surgeon, Apothecary, and Man-midwife; and it was agreed that *T. B. Farr* should pay a Premium of 2,000*l.* and should be admitted to a Share of the Profits and Gains of the Partnership for fourteen years, if the Parties should so long live. A Partnership Deed was accordingly executed by the Parties, 26th June 1809; and amongst other things, contained the following Clause:—" And it was further covenanted, concluded and agreed, by and between the said Parties, that in case either of them should happen to die before the end, expiration, or other sooner determination of the said term of fourteen years, then and in such case, the survivor of them, his Executors or Administrators, should and would accept and take the whole of the said Co-partnership Stocks, Monies, Goods, Debts, and Effects whatever, which, at or immediately before the decease of the Party so dying, should be in any wise appertaining to them the said Partners, for or by reason, or on account of their said joint Business; and also in consideration thereof, and for a full recompence and satisfaction to be had and made to the Executors or Administrators of the Party so dying, the surviving Partner should pay to the Executors or Administrators of the deceased Partner, so much good and lawful Money of the United Kingdom, current in England, as the full value of the Part and Share of or belonging to the Party so dying, of and in the said Stock and Trade, and such good Debts as aforesaid, did or should appear to have to have been or amounted to, by and according to the yearly Account then last before made and subscribed with their names as aforesaid; but if no such yearly Accounts should have been therefore made, then so much like lawful Money as the full value of the Parties so dying was or should at the time of his death amount to. And it was thereby further

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agreed, by and between the said Parties, that all such sum and sums of Money as should become due and payable by the Survivor of the said Parties, his Executors or Administrators, unto the Executors or Administrators of the Parties so dying as aforesaid, should be paid at the end of twelve Calendar Months next after such decease of the Parties so dying, together with Interest for the same, after the rate of *Five Pound per Centum*, to be computed from the decease of the Parties so dying as aforesaid; and for the better securing the payment of the said Monies accordingly, the surviving Partner should within one Calendar Month after the decease of said Partner so happening to die, enter into and become bound unto the Executors or Administrators of the Partner so deceased, in one or more Bond or Bonds, of double Penalty, conditioned for the payment to them of such Monies, at such times and in such manner and form as aforesaid; and should also thereupon become bound to the same Executors or Administrators in one or more Bond or Bonds of sufficient Penalty, for saving and keeping indemnified the Heirs, Executors and Administrators of the Party so dying, and his and their Lands and Tenements, Goods and Chattels, of, from and against all Debts which at the time of his decease were justly owing by said Partners, for or on account of said joint Business, or for any Goods, Bills, Notes, matters or things belonging or in anywise touching or relating to the same, or from and against all Actions, Suits, Damages and Expenses on account of the same Debts, every or any of them, all which said Debts said surviving Partner should and would pay and satisfy in due and convenient time. And it was thereby further agreed, that the Executors or Administrators of the Partner so dying, should and would, upon the executing such

Bonds as aforesaid, legally and effectually grant, assign and release unto the surviving Partner, his Executors and Administrators, all that part, share, right, Title and Interest, claim and demand whatsoever, of them the Executors or Administrators of the Partner so dying, of, in and to the said joint Stock and Business; and all the Monies, Goods, Bills, Notes, Debts, other than such Debts as are thereafter mentioned, Profits, Gains, and other Estates and Effects whatsoever, which at the time of such his decease were in Co-partnership between said Partners, or jointly owing or belonging unto them on account of their joint Business; and in case either of said Co-partners should die during the Co-partnership, then all such bad and desperate Debts due and owing to, and on account of said joint Business, as should not have been deemed and accounted a good Estate, and as such cast up and included in such yearly Account or Accounts to be made and stated as aforesaid, if any such Account or Accounts had been stated, should with due convenient speed be divided and shared between the surviving Partner, or his Executors or Administrators, and the Executors and Administrators of the Partner so dying as aforesaid, in proportion to the respective Shares and Interests of said Partners in their said joint Trade; and thereupon the surviving Partner, and the Executors or Administrators of the deceased Partner, should give unto each of them, and their Executors and Administrators, full power to get in and recover his and their respective parts of such bad Debts."

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The Partnership commenced, 1st January 1810. In June 1812, *T. B. Farr* died, intestate, and the Plaintiff administered to him. After the death of *T. B. Farr*,

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the Defendant sold the Business to a Mr. Fox, for a considerable sum of Money. The *Prayer* of the Bill, was, for an Account of the Partnership Dealings, &c. and that the Plaintiff might be declared entitled to a return of part of the Premium of 2,000*l.*, or to some allowance by reason of the death of the Intestate, and that the amount might be ascertained; or that the Defendant might account for the value of the Good-will of the Trade or Business, and of the Money which he had received or contracted to receive for the same from Mr. Fox; and that Plaintiff might have an allowance made to him in respect thereof, &c.

The principal question was, Whether the Plaintiff was entitled to any Share of what the Good-will of the Trade produced on the Sale to *Fox*, after the death of *T. B. Farr*?

Sir *Samuel Romilly*, and Mr. *Rouppell*, for the Plaintiff, contended that the Representative of the deceased Partner was entitled to a Share of the Sale of the Good-will of the Trade.

Mr. Hart, and Mr. *Swanston*, for the Defendants.

The Vice-Chancellor (stopping the Defendant's Counsel):—

In this Case the Articles define the Interest which the Representatives of a deceased Partner are to take, and there is no provision which gives them the benefit of the Good-will of the concern. But if the general question had arisen here, I think it would have been difficult to maintain that where a Partnership is formed between professional Persons, as Surgeons, and one dies, the other is obliged to give up his Business, and sell the connection for the joint benefit of himself and the estate of his deceased Partner. When such Partnerships

determine, unless there be stipulations to the contrary, each must be at liberty to continue his own exertions; and where the determination is by the death of one, the right of the Survivor cannot be affected. Such Partnerships are very different from commercial Partnerships. As to so much of the Bill, therefore, which prays a return of part of the premium, or a share of what the Good-will of the Trade sold for, the Bill must be dismissed. The other Account the Plaintiff is entitled to (a).

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GREATLEY v. NOBLE, and others.

23d February.

THIS was a Bill filed against the Defendants *Noble* and *Bowles*, and the Earl of *Pomfret*, and *Mary* Countess of *Pomfret*, stating, that under the Marriage Settlement of the Countess of *Pomfret*, 29th August 1793, 2,000*l.* yearly was secured, to be paid to Trustees (the Defendants *Noble* and *Bowles*), and by them paid and applied for such intents and purposes as the Countess of *Pomfret* should, notwithstanding her Coverture, direct or appoint; or in default of such appointment, into her own proper hands, for the sole and separate use and disposal of her the said *Mary* Countess of

Bill against a Feme Covert, seeking an account of Monies received under a Will fraudulently obtained by her, and placed out in Securities in Trustees names, and that the same may be repaid out of her separate Estate.

(a) In *Hammond v. Douglas*, 5 Ves. 539, Lord *Loughborough* determined that, the Good-will of a Trade carried on in Partnership without Articles, survives, and is not Partnership Stock; and that Profits accrued after the death of one Partner are joint Property;

but, in *Crawshaw v. Collins*, 15 Ves. 227, Lord *Eldon*, alluding to *Hammond v. Douglas*, says, "I agree with the liability of the doubt expressed by Sir *Samuel Romilly*, upon the other point there determined, that the Good-will survives."

General Demurrer overruled.
Qr.—As to the separate Estate demands upon her.

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Pomfret, and payable at the times therein mentioned :—That a separation took place between the *Earl* and the *Countess*, and a Suit was instituted by the *Countess* for a Divorce, and 2d March 1804, a separation was pronounced ; and that on the 12th July 1805, permanent *Alimony*, to the amount of 2,000*l.*, in addition to her *Pin Money*, was allotted to the *Countess* :—That the *Countess*, in addition to the 2,000*l.* given by the Settlement, and the 2,000*l.* by way of *Alimony*, is absolutely entitled to a large Estate, both Real and Personal, to the amount altogether of 35,000*l.*, which is secured to her sole and separate use, and vested in the Defendants *Noble* and *Bowles*, as her Trustees :—That a Bond or some other Deed was executed to the *Earl of Pomfret*, to indemnify him from the Debts, Contracts, and Engagements of the *Countess* :—That in 1804, the *Countess* fraudulently procured a Will in her favour from *Ann Beavour*, a Servant or Companion of the *Countess*, possessed of Copyhold Lands, Stock, &c.; but old, infirm, and incapable of making a Will :—That by such Will, *Ann Beavour* bequeathed to the *Countess*, her Heirs and Assigns, all her Real and Personal Estate, to and for the sole and separate use of the *Countess*, and not to be subject to the controul of her Husband, and appointed the Defendant *Noble*, Executor :—That about eight days after the execution of such pretended Will, *Ann Beavour* died :—That the *Countess* prevailed on the Defendant *Noble* to prove the Will, and requested him to sell out the Stock standing in the name of *Ann Beavour*, and pay the proceeds to her :—That *Noble*, believing the Will to be fairly obtained, duly proved the same, and sold out the Stock with the privity of the *Earl of Pomfret*, and *Noble* accounted for the proceeds to the *Countess*, and invested the same

In certain Securities for her sole and separate use—That *Noble*, with the privity of the *Earl*, possessed himself of various other parts of the Personal Estate and Effects of *Ann Beavour*, and accounted for the same to the *Countess*, or invested the same in some manner in certain Securities for her sole and separate use—That the *Countess*, without the assent of *Noble*, took possession of some of the Property of *Ann Beavour*, and more than sufficient to pay her Debts, without accounting for the same—That the Plaintiff and the other relations of *Ann Beavour* being at a distance, were not aware until February 1811, that a Will had been improperly obtained from her—That Plaintiff, in November 1812, instituted a Suit in the Ecclesiastical Court, for the revocation of the Probate of the Will of *Ann Beavour*—That by the proceedings in that Suit, it appears that the pretended Will of *Ann Beavour* was obtained from her at a time when she was incompetent to make a Will—That by the Decree of the Ecclesiastical Court, 27th November 1813, the Probate was revoked, and *Ann Beavour* pronounced to have died Intestate—That the Plaintiff, as one of the next of kin of *Ann Beavour*, on the 15th February 1814, obtained Letters of Administration—That sometime after *Noble* had paid or accounted with the *Countess* for the Personal Estate and Effects of *Ann Beavour*, viz. 1st August 1810, he was declared a Bankrupt, and he obtained his Certificate—That his separate Estate paid a Dividend of 14 s. 4 d. in the Pound—That neither the *Countess* or *Noble* have accounted with the Plaintiff for the Personal Estate and Effects of *Ann Beavour*, possessed by them; and that under such circumstances, the Plaintiff is advised that the *Earl of Pomfret*, or the separate Estate of the *Countess*, is liable to answer to the Plaintiff for the Personal Estate

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of the Intestate *Ann Beavour*, possessed by her or by *Noble*, and paid over by him to the *Countess*. The Bill then stated applications for that purpose to the *Earl* and *Countess*, and their refusals, and proceeded thus:—

“ And the said *George*, Earl of *Pomfret*, and *Mary* his “ Wife, to countenance such refusals, sometimes pre-
 “ tend, that although the Probate of the said pre-
 “ tended last Will and Testament was revoked, yet
 “ that the execution of the same was not fraudulently
 “ procured; or that if it were, she the said *Mary* Coun-
 “ tess of *Pomfret*, was neither a Party, nor privy to
 “ any fraud relative thereto: the contrary of which
 “ pretences the Plaintiff charges to be the truth; and
 “ that the said Defendant, *Mary* Countess of *Pomfret*,
 “ was the contriver of, and by means of persons em-
 “ ployed by her, and who acted by and under her
 “ directions, actually procured, by fraudulent means
 “ the execution not only of the said pretended last Will
 “ and Testament of the said Intestate *Ann Beavour*,
 “ otherwise *Beaver*, with the intention of defrauding
 “ the Plaintiff, and the other next of kin of the said
 “ Intestate, of the whole of her the said Intestate’s
 “ Personal Estate and Effects, and applying the same
 “ to her own sole use and benefit; but that the said
 “ pretended last Will and Testament, hereinbefore
 “ mentioned, is the second pretended Will and Testa-
 “ ment of the said *Ann Beavour*, otherwise *Beaver*, of
 “ which the said *Mary* Countess of *Pomfret* hath frau-
 “ dulously procured the execution by the said Intes-
 “ tate; for the Plaintiff expressly charges, as the truth
 “ is, that the said Defendant, *Mary* Countess of *Pom-
 “ fret*, without having any conversation with, or any
 “ instructions from the said Intestate, in any manner
 “ relating to her the said Intestate’s Real or Personal
 “ Property, or her the said Intestate’s disposal thereof,

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" or intentions relative thereto ; and although no directions or instructions had been given by the said Intestate *Ann Beavour*, otherwise *Beaver*, to any person whomsoever, for her the said Intestate's Will, or for any Paper Writing purporting to be her last Will and Testament, or for any Paper Writing whatever to be drawn up, did, on or about the 28th day of November, in the said year 1804, give instructions to, and employ a person to draw up, or procure to be drawn up, an Instrument or Paper Writing, purporting to be the Will and Testament of the said *Ann Beavour*, otherwise *Beaver*, and purporting to give and bequeath to *Mary Brown*, then Countess of *Pomfret* (meaning the said Defendant *Mary Countess of Pomfret*), her Heirs and Assigns, all her the said *Ann Beavour*, otherwise *Beaver's*, Real Estate, and all her Personal Estate, and to appoint *William Noble*, of *Pall Mall*, Esquire, (meaning the said Defendant *William Noble*, then of *Pall Mall*), to be her the said *Ann Beavour*, otherwise *Beaver's*, Executor; and that the said Defendant, *Mary Countess of Pomfret*, having procured the said Instrument or Paper Writing to be drawn up, she further, on or about the 28th day of November, in the said year 1804, by the means and intervention of persons solely employed by her, and acting solely by and under her directions, fraudulently procured the said Instrument or Paper Writing to be executed by the said *Ann Beavour*, otherwise *Beaver*, as her the said *Ann Beavour*, otherwise *Beaver's*, Will and Testament, at a time when the said *Ann Beavour*, otherwise *Beaver*, by reason of her not being of sound and disposing mind, memory, and understanding, was, as the said Defendant *Mary Countess of Pomfret* well knew, utterly incompetent to make a Will : And that the same Defendant, *Mary*

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" in like manner as in the former instance hereinbefore mentioned, as the said Defendant *Mary Countess of Pomfret* well knew, utterly incompetent to make a Will:—And the Plaintiff expressly charges, that the said last-mentioned Paper Writing is the pretended last Will and Testament of the said *Ann Beavour*, otherwise *Beaver*, the Probate whereof hath been revoked by a Suit in the Prerogative Court of the Archbishop of *Canterbury*, as is hereinbefore mentioned." The Bill then insisted, that even if the Countess had no concern in fraudulently procuring the execution of the said pretended Will, nevertheless, she and the Earl her Husband are liable for the Personal Estate and Effects of *Ann Beavour*, possessed by the Defendant the Countess, or by Noble, since Noble acted only as the Agent of the Countess, who received all the Property, with the privity of the Earl:—That the Earl was privy to all the transactions relative to the Estate and Effects of *Ann Beavour*, and allowed her to act as a *Feme Sole*:—That a Bond, and also other Instruments have been made to the Earl, to indemnify him against all the Debts, Contracts, Acts and Engagements of the Countess; and that her separate Property and Alimony are in some manner engaged to indemnify him against the Debts, Contracts, Acts and Engagements of the Countess:—That the Countess applied the Property she received, in respect of the Intestate's Estate, to her own sole use, by investing the produce thereof, together with the proceeds of the Stock, in the names of Trustees, upon certain Securities, for her sole and separate use, or by mingling the same with her separate Property; and that she hath not the benefit thereof, and of the accumulations thereof, as part of her separate Estate:—That several Letters passed between the Defendants, and them and other persons now in their custody or power; and divers Deeds, Books,

Letters, Copies of Letters, Vouchers, Memorandums, and other Writings relating to the transactions aforesaid, and particularly to the advice and opinion given by the Attorney or Solicitor to the Countess, and to the amount of the Estate and Effects of said Intestate *Ann Beavour*, received by or come to the hands of the Defendants respectively, and of their application thereof; but the Defendants refuse to produce such Papers, &c. or to permit an inspection or examination of the same. The Bill then interrogated as to the facts stated in the Bill; and, amongst others, contained interrogatories, founded on that part of the Bill before stated, and marked with inverted commas. The Bill *prayed*, an Account of the Estate and Effects of *Ann Beavour*, received by the Defendant *Noble*, and paid to the Countess of *Pomfret*; an Account of what was received by her; and that what should appear to be due to the Plaintiff, together with Interest, be paid to the Plaintiff out of the separate Property of the Countess of *Pomfret*, in the hands of her Trustees, the Defendants *Noble* and *Bowles*; and that directions might be given to them to pay the same, or that the Defendant *George Earl of Pomfret* might answer the same.

The Defendants applied for an Order to refer the Bill for Impertinence.

The part of the Bill which it was contended was impertinent, were the passages which are given with inverted commas, and the Interrogatories founded on them.

The Master reported these passages in the Bill to be impertinent; and his report was excepted to.

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The Exceptions came on to be argued; but as they involved a question of considerable importance, in regard to the general liability of a *Feme Covert's* separate Estate, the *Vice-Chancellor* suggested it would be better to bring on the question by a Demurrer to the Bill.

The Demurrer came on now to be argued.

Mr. *Shadwell*, in support of the Demurrer:—

The Plaintiff has not stated a Case entitling him to relief out of the separate Estate of the Defendant the Countess of *Pomfret*. A *Feme Covert* cannot affect her separate Estate, unless by some written Instrument. A moral or a general obligation is not sufficient to sustain a claim upon her separate Estate. The Duke of *Bolton v. Williams* (a), and *Jones v. Harris* (b), are authorities for that proposition.

In *Nantes v. Corrock* (c), the Case which approaches nearest the present, a Bill was filed against a married woman, having separate property, to have Deeds, assigning Stock, set aside, as obtained by undue influence by her over her Master, and for an Account. Her separate property consisted of Stock. The *Lord Chancellor* dismissed the Bill. In *Thorpe v. Goodhall* (d), it was determined, that a Bankrupt seised for life with a general power of appointment, with remainder, in default of appointment, to the Heirs of his body, cannot be compelled, by a Decree in Equity, to execute the power in favour of his Creditors. This Bill, therefore, so far

(a) 2 Ves. jun. 138.

(b) 9 Ves. 495.

(c) 9 Ves. 182.

(d) 17 Ves. 46; and see what Lord *Thurlow* says in *Hulme v. Tenant*, 1 Bro. C.C., p. 21, 22.

as it seeks relief in respect of any power which the Countess of *Pomfret* has, must be dismissed.

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The Pin Money settled on her, and the Alimony given to her, must be considered as so given to support her rank (*c*), similar to the Half-pay of an Officer (*d*), and cannot, therefore, be taken from her in discharge of a mere moral obligation.

On these grounds and authorities, it is clear, that, supposing the facts stated in the Bill to be true, no relief can be had, as prayed, against the separate Property of the Countess of *Pomfret*.

Mr. Bell, and *Mr. Mascall*, in support of the Bill:—

The question is, Whether a married woman, living apart from her Husband, and having separate Property, the same is liable to her Debts, without a written Instrument, specifically charging the separate Estate? It is admitted she may dispose of her separate Property, by a specific charge on her separate Estate; and we submit, such Estate is liable to her Debts. In *Norton v. Turville* (*e*), a *Feme Covert*, having a separate Estate, gave a Bond; and it was held to be a charge on her separate Estate, though the separate Estate had not been specifically charged. In *Grigby v. Cox* (*f*), a *Feme Covert* was held bound to convey her separate Estate, which she had contracted to sell. *Allen v. Papworth* (*g*) proceeds on the same principle. *Hulme v. Tenant* (*h*) is expressly in point. Lord *Thurlow* says,

(*c*) See *Oliver v. Enfonne*,
Dyer, 1, 2.

(*d*) See *Stone v. Lidderdale*,
• *Anst.* 533.

(*e*) 2 P. Wms. 144.
(*f*) 2 Ves. sen. 517.
(*g*) 1 Ves. sen. 163.
(*h*) 1 Bro. C. C. 20.

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"I have no doubt about this principle, that if a *Feme Covert* may have a separate Estate, the Court will bind her to the whole extent, as to making that Estate liable to her own engagements; as, for instance, for payment of Debts," &c.: and he accordingly held, that her separate Estate was liable, in respect of a Bond she had entered into jointly with her Husband. In *Sockett v. Wray*(i), Lord Alvanley subscribes to that doctrine. In *Heatly v. Thomas*(k), where a Bond was given as a Surety by a *Feme Covert*, the late *Master of the Rolls*(l) enforced payment of it out of her separate Estate. In *Bullpin v. Clarke*(m), a Decree was made for the payment of a Promissory Note given by a *Feme Covert* out of her separate Estate. These Cases fully establish the proposition, that a *Feme Covert*, with a separate Estate, contracting a Debt, her separate Property is liable, though she has not specifically charged such separate Estate with the payment of the Debt. It is hardly necessary to go through the old Cases. In *Kenge v. Delaval*(n) it was held, that a woman living from her Husband, and having a separate maintenance, it was liable to her Debts; but that after her Husband's death, the Creditors could not charge her Jointure. In *Dubois v. Hale*(o), a demand was made out of the separate Estate of the Wife. Her Husband was a Party to the Suit, but out of the jurisdiction. The Suit, however, was allowed to proceed against her; and she standing out process of contempt, a Decree, *pro confesso*, was obtained. *Stamford v. Marshall*(p) was decided on the ground of the liability of separate Property to the

(i) 4 Bro. C. C. 485, 6.

Raithby's valuable edition of those Reports.

(k) 15 Ves. 596.

(o) 2 Vern. 613.

(l) Sir William Grant.

(p) 2 Atk. 69.

(m) 17 Ves. 365.

(n) 1 Vern. p. 325. of Mr.

general engagements of a *Feme Covert*. The only exception to the general rule is, in the Cases cited of the *Duke of Bolton v. Williams*, and *Jones v. Harris*, which establish, that where an Annuity is granted out of the separate Estate of a *Feme Covert*, and the Annuity is set aside for a defect in the Memorial, the Grantee cannot recover, out of the separate Estate of the *Feme Covert*, the Consideration he has paid for the Annuity. With the exception of this particular Case, the general rule is, that a *Feme Covert*, with a separate Estate, is considered as a *Feme Sole*, and her separate Estate is liable to answer such obligations as she would be compellable to discharge if she were a *Feme Sole*. In *Nantes v. Corrock* there was a difficulty, because the separate Property was Stock; but if there had been other separate Property, it would have been liable. A gross fraud has been committed; and it is but just that she should refund the produce of that fraud. In *Souage v. Foster* (q) it was held, that in cases of fraud, "Infancy or Coverture shall be no excuse." In *Watts v. Crosswell* (r) an Infant was held responsible for a fraud. If there had not been a separation, and an allowance of a separate maintenance, the Earl of *Pomfret* would have been liable to the demand made by this Bill; and we submit, that whatever demands the Husband is exempted from discharging, on account of the separation and separate allowance, the Wife is bound to discharge out of her separate Estate. Her separate Estate has been increased by a gross fraud. Some of the Property obtained under this Will still remains in specie in her Trustees hands; and though it were held that her sepa-

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(q) 9 Mod. 35.

9 Vin. 415; and see *Cory v.*(r) 2 Equity Cases abr. 515; *Gertoken*, ante, 2 vol. p. 40.

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rate Estate is not liable, yet this Property, the produce of the fraud in the Trustees hands, is liable to the Plaintiff's claims. *Thorpe v. Goodhall* does not apply. We do not claim the separate Estate on the ground of an appointment, but on the general ground of its liability to her Debts. The Case of the assignment of the half pay does not apply; nor the Case as to Property given to support a Title. If the latter applied at all, it could not apply to the separate Estate acquired by the Settlement on her Marriage.

Upon the whole we contend, that this is a Case in which the separate Property of the Countess of Pomfret is liable to the demands made by this Bill.

Mr. Shadwell, in Reply:—

In *Norton v. Turville* the claim was not against the *Feme Covert*, but her Executors. In *Bullpin v. Clarke*, it was clear the *Feme Covert* intended to charge her separate Estate. In *Kenge v. Delavall*, the Opinion given was extra-judicial, the Case not calling for it. In *Dubois v. Hole*, there was merely a Decree *pro confesso*, without argument. With respect to *Hulme v. Tenant*, Lord Thurlow, by the words "her own engagements (s)," must have meant some contract in writing. This meaning is fully expressed when he first gave an Opinion on the Case; for he says, "The question is, how far her general personal engagements shall be executed out of her separate Estate: if she had by *Instrument contracted* that this or that portion of her separate Estate should be disposed of in this or that way, I think she or her Trustees might have been

(s) See 4 Bro. C. C. p. 21.

decreed to make that disposition (*t*).” This marks what he meant by the words “ general engagement.” Lord *Alvanley* so understands him in *Socket v. Wray*. He says, “ Lord *Thurlow* says there (speaking of *Hulme v. Tenant*), that the Court cannot exercise any power as to her person; but if she affects to enter into any contract which would make her person liable if she was a *Feme Sole*, it shall operate upon her. Property in the hands of the Trustee.” No Contract was entered into by the Countess of *Pomfret*. The same Case is reported in *Dickens* (*u*), where Lord *Alvanley* is reported to say, “ That a general engagement by the Wife, I am clear, will not bind her.” In *Allen v. Papworth*, the Wife submitted to account; that Case, therefore, is no authority. *Grigby v. Cox* is not in point; there the Wife agreed to sell her separate Estate, and was held bound by such agreement; that is not disputed. In no case has a demand against a married woman, arising out of a fraud, been decreed to be satisfied out of her separate Estate.

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The VICE-CHANCELLOR:—

The Demurrer is upon the supposition, that if all the facts in the Bill are admitted to be true, the Plaintiff is not entitled to any relief. The Bill states, that under the Will of *Ann Beavour*, which it charges was obtained by fraud, the Defendant *William Noble*, with the privity and at the request of the Countess of *Pomfret*, sold out of the Funds considerable Property, part of the Personal Estate of *Ann Beavour*, and paid over or accounted for the Proceeds to the Defendant the Countess of *Pomfret*, or invested the same in some manner in certain Securities in Trustees names, for the said Countess

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of *Pomfret's* sole and separate use; and the Bill makes the same statement as to other part of the Property of *Ann Beavour*. Supposing, therefore, no relief could be had against her separate Estate, yet if the statements in the Bill be true, and there was Property, which was part of the Estate of *Ann Beavour*, received by *William Noble*, and invested by him in the Name of Trustees for the use of Lady *Pomfret*, those Trustees would be bound to transfer that Property to the representatives of *Ann Beavour*; they would be Trustees for them. The Bill, therefore, must be answered. In this view of the Case, it is not necessary to determine the general point, which has been ably argued, as to the liability of a *Feme Covert's* separate Estate to answer general demands upon her. At Law, there can be no separate enjoyment of Property by a *Feme Covert*; in Equity, there may; and as incident to the power of enjoyment, she has a power of charging her separate Property. Where a Wife, as in *Hulme v. Tenant*, and other Cases, joins with her Husband in a Security, it is implied to be an execution of her power to charge her separate Property. If it were necessary now to decide the point, I think it would be difficult to find either principle or authority for reaching the separate Estate of a *Feme Covert* as if she were a *Feme Sole*, without any charge on her part, either express or to be implied. The Exceptions must be allowed, and the Demurrer overruled (x).

(x) In a subsequent Case of *Stuart v. Lady Kirkwall*, 2d May 1818, where the separate Estate of a *Feme Covert* was sought to be rendered liable to her general engagements, the

Vice-Chancellor said, alluding to this Case, he had expressed his opinion that the separate Estate of a *Feme Covert* was not liable to answer general demands upon her.

CUTLER v. BROUGHTON.

THIS was a Bill for the specific performance of an Agreement to purchase certain Lands.

On the 15th January 1817, the Defendant, who was in possession of the Estate, put in a Demurrer to the Bill, which was set down before the Lord Chancellor.

An Order was obtained from the Lord Chancellor, 23d January 1817, that the Plaintiff should, on or before the 18th August following, deposit the Conveyance of the Estate purchased by the Defendant, executed by all proper Parties, in the office of the Master; and thereupon it was ordered, that the Defendant should, on or before the 22d of August, pay 7,395*l.* the residue of the Purchase Money for the Estate in question, after deducting the sum of 1,305*l.* the Deposit paid by him to the Defendant Driver, on such Purchase Money, together with Interest, at the rate of 5*l.* per cent., from the 29th December 1813 to the time of such payment (the amount thereof to be verified by Affidavit), and also the sum of 10*l.* 10*s.*, the amount of the valuation of the Timber on the said Estate, into the Bank, to the credit of the cause, subject to the further Order of the Court. And in case the Defendant should not pay his Purchase Money and Interest within the time aforesaid, the Plaintiff was to be at liberty to make such application to the Court, on the 23d of August, as he might be advised. And the money so paid was to be laid out in the purchase of Three per

25th February.
Bill filed for a specific performance of an Agreement to purchase, and demurred to.
Order made, that on a Conveyance of the Estate from the Plaintiff to the Defendant being deposited with the Master, the Vendee should pay into Court his Purchase Money; which Order was complied with.

Motion, that Master should deliver the Conveyance to the Vendee, refused.

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Cents., and the Interest, as it accrued due, when it amounted to a competent sum, was to be laid out in the Three per Cents. in trust in the cause.

The Conveyance was accordingly lodged with the *Master*; and the Purchase Money paid in.

A Motion was now made, on the part of the Defendant, that the Conveyance, deposited with the *Master*, pursuant to the Order of the 23d July 1817, might be delivered out to the Plaintiff or his Solicitor, he having paid into Court his Purchase Money for the same.

Mr. *Heald*, in support of the Motion:—

The Defendant, having paid in his Purchase Money, is desirous of having the Conveyance to him, out of the *Master's* hands. He may wish to sell or mortgage the Estate; and having paid in his Purchase Money, it would be a great hardship to wait till the final decision of the Cause, which, now, can only turn upon the question of Costs.

Sir *S. Romilly*, and Mr. *Dowdeswell*, *contra*:—

If this Motion were proper, the Defendant, when the Order of the 13th July 1817 was made, might then have urged that the Conveyance of the Estate should be delivered to him, when the Purchase Money was paid into Court; but he did not then ask that, nor can he properly ask it now.

A Demurrer is put into the Bill, and is set down before the *Lord Chancellor*, and it will be a considerable time before it can be heard.

The Plaintiff has not received the Purchase Money; it is in the hands of the Court; and would it be equal justice to both parties to suffer the Defendant to have the Conveyance of the Estate, and yet keep the Purchase Money from the Vendor? The Conveyance and the Purchase Money must remain where they are until the Cause is decided. If the Demurrer is allowed, the Conveyance must be returned to the Vendor, and the Purchase Money to the Vendee. The Suit ought not to be put an end to, so far as the Vendee is concerned, and kept alive as to the Vendor. Great difficulty would occur if the Demurrer is allowed, and the Vendee permitted in the mean time to sell or mortgage the Estate.

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Mr. Heald, in Reply:—

We have no objection to the Vendor receiving his Purchase Money out of Court.

The VICE-CHANCELLOR:—

The Defendant asks for the Conveyance, and is willing that the Vendor should receive the Purchase Money, which is in truth submitting to a Decree against him in this Cause, without prejudice to the question of Costs. But unless the Plaintiff consents, I can make no such decretal Order whilst the Demurrer is pending. The Parties seem nearly agreed, and would do well to settle this matter between themselves.

Motion refused.

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BATEMAN and others v. DAVIS and others.

27th February.

Power to Trustees, with Consent of A. under her hand, with two Witnesses, to advance 1,500 l. to her Husband. They advance the Money, without the Consent of A. Afterwards A., by an Instrument under her hand, attested by two Witnesses, testifies that the Money was advanced with her Consent. Held, on a Bill filed by A., that the Trustees must refund the 1,500 l.

FROM the Bill and Answer in this Cause, the facts appeared to be, that by a Settlement on the Marriage of the Plaintiff, a Power was given to the Trustees, "at any time or times after the solemnization of the then intended Marriage, by and with the Consent of (the Plaintiff) Dame *Ann Bateman*, if living, to be testified by Writing under her hand, and attested by two or more credible Witnesses, but in case of her death, then in the said Trustees own discretion, to transfer and sell out so much or such part or parts of the Sum of 6,000 l. Bank Reduced Annuities, as they in their discretion should think proper, not exceeding in the whole the sum of 1,500 l. and to pay and apply the same for the promotion and advancement in the world of (the Defendant) Sir *John Bateman* (the Husband of the Plaintiff).

The Trustees, without the written Consent of the Wife, sold out 1,500 l. Stock, and paid the same to the Husband of the Plaintiff.

After the Stock had been so sold out, the Plaintiff executed a Deed, attested by two Witnesses, in which the Settlement was recited, and the Power therein, and the advance of the Money without a written Consent, as prescribed by the Power; and she then, by the Deed, "did testify and declare that it was with her full Consent and Approbation that the Trustees had sold out the 1,500 l. Three per Cent. Bank Annuities, in her

Settlement mentioned, and paid the produce arising therefrom to her said Husband, said *John Bateman*."

The question was, whether, under these circumstances, the Trustees were bound to replace the 1,500*l.* Stock?

Mr. Hart, and *Mr. Brewer*, for the Plaintiffs.

Sir S. Romilly, *Mr. Heald*, and *Mr. Barber*, for the Defendants:—

They contended, that though the Money was advanced without Consent, yet that the subsequent ratification by the Plaintiff exonerated the Trustees.

The VICE-CHANCELLOR:—

The Settlement gives a discretion to the Trustees, with the Consent of the Plaintiff, to advance 1,500*l.* Stock, to the Husband of the Plaintiff. The Trustees think fit to advance the 1,500*l.* without the Consent of the Plaintiff. They cannot justify this breach of trust by alledging the subsequent approbation of the Plaintiff. The actual advance of the Money to the Husband, who perhaps had spent it, created a pressure upon the judgment of the Plaintiff, which gave to her subsequent approbation a very different character from the free consent required by the Settlement. The Assets of the Trustees (they being dead) must refund the 1,500*l.* Stock, and pay the Costs of the Suit.

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1818.THOMAS MANSFIELD, ISAAC TAYLOR, and
MARY MANSFIELD, Widow, v. SHAW.

28th February.

Injunction, to restrain Defendant from receiving a Testator's Effects, and to stay Trial of Actions, granted before Answer, under the circumstances.

WILLIAM SHAW, by his Will, 16th February 1817, appointed the Plaintiff and another person his Executors, and thereby revoked all former Wills. On the day of the Funeral of *William Shaw*, the Will was read in the presence of the Plaintiffs and the Defendant. The Defendant, however, set up a prior Will, of the 1st January 1817, under which he was Executor and universal Legatee, and proved the same, and took possession of a considerable part of the Testator's Effects, and threatened to possess himself of the whole. The Plaintiff *Mansfield* (the other Executor declining to act) instituted a Suit in the Ecclesiastical Court to establish the Will last made, and to revoke the Probate obtained by the Defendant, and caused Witnesses to be examined, and the Suit remained merely for Judgment. The Defendant was in insolvent circumstances, and aware his Probate could not be sustained, was possessing himself of the Estate and Effects of the deceased, and had brought several Actions against persons indebted to the Testator; and, amongst other Actions, one against the Plaintiff *Thomas Mansfield*, to recover the sum of 100*l.*; another Action against the Plaintiff *Isaac Taylor*, for 100*l.*; and another against the Plaintiff *Mary Mansfield*, for 50*l.*; and intended proceeding to Trial in such Actions at the ensuing Assizes for Warwick. The General Issue was pleaded to the Actions, in the expectation that the Ecclesiastical Court

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would, before the Trial, recal the Probate obtained by the Defendant, who would then have discontinued his Actions; or if not, the Defendants to the same might avail themselves of it by a Plea, *Puis darrein continuance*.

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Upon a Bill being filed, stating these facts, and praying an Account, a Receiver, and an Injunction against intermeddling with the Effects, and against proceeding in the Actions at Law, and an Affidavit verifying the statements in the Bill, and of service of the Subpoena on the Defendant, a Motion was made by

Mr Rose, for an Injunction, and to stay the Trial of the Actions at the ensuing Assizes.

The VICE-CHANCELLOR:—

As you state the Defendant is insolvent; you have shown a Case where irreparable mischief may ensue; and, under the circumstances, take your Motion, upon paying into Court the Money sought to be recovered by the Actions.

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FIELD v. BEAUMONT and Ux.

28th February.
An Action was commenced in July 1816, and tried at York Assizes in July 1817.

On 21st Jan. 1818 a new Trial was granted; whereupon Plaintiff filed his Bill for a Discovery, and obtained the common Injunction. The new Trial at York was fixed for the 7th of March.

On a Motion to extend the Injunction to stay Trial, the same was refused, with Costs.

A MOTION was made in this Cause, that a common Injunction, which had been obtained, might be extended to stay Trial, on the usual Affidavit of the Plaintiff and his Solicitor, as to the materiality of the Defendant's Answer to the Plaintiff's defence at Law.

The Action was commenced in July 1816, and was tried at the York Assizes in July 1817, and a Verdict obtained for the Plaintiff. On the 21st January 1818 a Rule was made absolute for a new Trial. On the 9th of February following, the present Bill was filed, and the common Injunction obtained. The new Trial was fixed for the 7th of March, at the York Assizes.

Mr. Bell, and Mr. Buck, in support of the Motion:—

On the former Trial the Court said, certain Deeds in the possession of the Defendant ought to have been produced, and the object of this Bill is a Discovery of those Deeds.

The Solicitor General, and Mr. Wingfield, contra:—

The Trial is to take place this day week at York. The Motion might have been made before, the Bill having been filed on the 9th February. The Court will not, after such delay, on the eve of the Trial, extend the Injunction.

The VICE-CHANCELLOR:—

This Action has been pending two years, and the only apology for not filing this Bill sooner is, not that the Plaintiff has lately discovered that the Deeds in question were in possession of the Defendant, but that

he was not, before the Trial, aware of their importance. After such delay, and the new Trial so near, I cannot grant this Motion.

Motion refused, with Costs.

N. B.—The Decision on this Motion was appealed from, to the *Lord Chancellor*, who affirmed it.

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BARNES v. ABRAM and the Rev. RICHARD LLOYD.

THE Plaintiff, the Improper Rector of the Parish of *St. Dunstan's in the West*, filed this Bill against the Defendant *Abram*, a Parishioner, and also against the Defendant *Lloyd*, the Vicar, for Tythes due to him as Improper Rector, after the rate of 2*s. 9d.* in the pound, as directed by the Act of the 37th *Henry VIII.* c. 12. To this Bill the Defendants put in their Answers, insisting, the Plaintiff was not entitled to the Tythes, but only to an annual Sum in lieu of the same, and that the Tythes belong and ought to be paid to the Vicar.

The B. was filed in *Trinity Term 1813*. In *Hilary Term 1814* the Answers were put in. In *Easter Term 1815* the Bill was amended. In the same Term a Replication was filed. In *Hilary Term 1816* Subpoenas to rejoin were served, and Rules given to produce Witnesses and pass Publication, and the Cause was set down; since which, Publication had, from time to time been enlarged at the instance of the Defendants. In March 1816 Subpoenas to hear Judgment were served,

Publication in a Tithe Cause enlarged, though frequently enlarged before, to enable the Defendants to search for Records in the Vatican, upon Affidavits as to the probability of a successful search there.

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and another.

No Witnesses had been examined on either side.

Mr. *Bell*, and Mr. *Stephen*, now moved to enlarge Publication upon the following Affidavits :—“ *John Hickin*, of the Record Office in the Tower of *London*, Gentleman, and *Charles Arnold*, Managing Clerk to *Thomas Allan*, of *Frederick's Place, Old Jewry*, in the City of *London*, Gentleman, Solicitor for the Defendants in this Cause, severally make Oath, and say, and first this Deponent *J. Hickin*, for himself, saith, that at the time of the commencement of this Suit, he this Deponent was employed, at the instance or on the behalf of the Defendants in this Cause, to make numerous enquiries and laborious searches for various Documents and Records, from and subsequent to the year 1237, relative to the Parish of *St. Dunstan in the West, London*, and the Tythes thereof; and this Deponent saith, that he this Deponent hath diligently and actively pursued the enquiries and searches aforesaid; and this Deponent further and positively saith, that on his part there hath been no delay or procrastination in the prosecution of the searches aforesaid; and this Deponent further saith, that the searches aforesaid are still in prosecution, and that although he this Deponent hath discovered and obtained many of the ancient Documents and Writings required, he hath been unable, with the utmost activity and diligence, hitherto fully to complete the requisite searches, or to discover and obtain the whole of the said Documents, but that nevertheless this Deponent hath entertained and doth still entertain good hope that he shall shortly be able to find and procure the same, or some of them; and this Deponent further saith, he doth believe that he this Deponent shall be able to complete the searches aforesaid, so far as the same can

be successfully prosecuted in *England*, and shall be enabled to prove the same, by the latter end of the month of May or beginning of June next; and this Deponent further saith, that the reason why he this Deponent hath not been earlier examined as a Witness in this Cause, hath been, that he hath been unable as aforesaid to find and obtain all the Documents which were required, and that he hath entertained a confident expectation of finding the same, and that there hath been no other reason than as aforesaid for this Deponent delaying to give his evidence in this Cause; and this Deponent further saith, it appears to him this Deponeat, and he doth verily believe, that the Church of *St. Dunstan in the West*, having previously belonged to *Westminster Abbey*, was given in the year 1237, by the Abbot and Convent of that Monastery, to King *Henry the Third*, who afterwards, on his founding the house for converted Jews, assigned the said Church for the support of that house; and that in the year 1317 the Bishop of *London* ordained, with the consent of King *Edward the Third*, that in future the King should present a Rector to the same Church; and the Deponent further saith, it also appears to him, and he believes, that the patronage of the Rectory aforesaid remained in the Crown till 1361, and was then given to *Alnwick Abbey*, in *Northumberland*, and that in 1401 the said Rectory was appropriated to the Abbey of *Alnwick* aforesaid, with leave to supply the Cure by one of their own Canons or other Secular Priest, removable at pleasure, and that it doth not appear that any Rector was instituted to the Church for many years, until a Vicarage was ordained and endowed, which appears to this Deponent, and he believes, was shortly before the year 1437, as in that year a Vicar appears to have been

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first instituted to the said Church, and in that institution are these words, " *hac prima vice post dict Vicarie ordinationem;*" and this Deponent saith, it is evident to this Deponent from various Documents which he hath seen and inspected, that at or about the time last-mentioned the Vicarage of St. Dunstan in the West aforesaid was endowed, and that the Patronage of the said Vicarage continued in *Abrowick Abbey* until its suppression; and this Deponent further saith, that he hath diligently searched among the Records of the Abbey of *Abrowick*, so far as this Deponent hath as yet been able to discover and procure access thereto, and in many other places where it appeared to this Deponent he might search with success, for various Documents in proof of the facts hereinbefore stated, and particularly for the endowment of the said Vicarage, but that with respect to some of such Documents, and particularly the said Endowment, this Deponent's search hath not hitherto been successful; and this Deponent saith further, he doth verily believe it was the practice of Religious Houses in *England*, in the 14th and 15th centuries, frequently to transmit original Acts and Documents, or Copies thereof, relative to such Religious Houses and their Possessions, to *Rome*; and this Deponent saith, that he this Deponent hath been for many years last past professionally acquainted and conversant with ancient Documents and Records, and the respective places, public and private, where the same are deposited, and with the fit and most probable places in which to search for the same; and this Deponent further saith, that he verily believes, that at the period of the dissolution of Monasteries in *England*, many of the Endowments of Vicarages in *England* were carried to *Rome* and deposited there; and this Depon-

went saith, that for the reasons before mentioned he considers and believes, that after search hath been made in the public and private Repositories of Records in England, as hath in this case been done, the Vatican is the next most probable place to search for the Endowment of a Vicarage in England; and he saith, that for the reasons aforesaid, he verily believes it is probable that some of the Documents and Writings aforesaid, for which this Deponent hath hitherto searched in vain in England, and particularly the Endowment of the said Vicarage, or ancient Copies of such Documents and of the said Endowment, may now be found at Rome; and this Deponent further saith, that the searches made by this Deponent as aforesaid have not been confined to the period last before mentioned, that is to say, from the year 1237 to the year 1437, but that the same searches have been made for Documents intended to be given in evidence on the part of the Defendants, from the said year 1237 to the year 1783, and several of such Documents are of a date later than the said year 1783. And this Deponent Charles Arnold saith, that he hath had the management and conduct of this Cause on the part of the Defendants; and he saith, that all and every of the searches hereinbefore mentioned have been made and prosecuted by the advice and opinion of the Counsel for the Defendants in this Cause; and that all and every of the Documents hereinbefore mentioned or alluded to, and all and every the Documents for which search has been made as aforesaid, are, in the opinion of the Counsel for the Defendants in this Cause, and as by this Deponent verily believes, material and necessary to the defence of the Defendants herein; and that the said Counsel for the Defendants are of opinion, and this Deponent doth verily believe,

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that the said Defendants cannot safely proceed to a hearing of this Cause without the production and proof of the same ; and that in the opinion of the Counsel for the Defendants, and as this Deponent verily believes, the Endowment of the said Vicarage of the Parish of *St. Dunstan in the West* is a most material and necessary Document to be given in Evidence on the part of the said Defendants ; and this Deponent further and positively saith, that all possible activity and diligence hath been used on the part of the Defendants in this Cause in the searches aforesaid, and in obtaining the necessary evidence, under the advice of their Counsel, from the commencement of this Suit, and that there hath not been any unnecessary or avoidable delay on their part ; and he positively saith, that the said Defendants have no intention, in their present application to this honourable Court, to delay the hearing of this Cause and further proceedings therein, other than truly and solely for the purpose of procuring the evidence which they have hitherto been unable to obtain, and of examining many and material Witnesses in this Cause ; and this Deponent further saith, that the Witnesses on the part of the Defendants have not hitherto been examined, solely because the searches aforesaid were incomplete, and further material and necessary evidence was and is confidently expected to be obtained, and for no other reason and on no other account ; and this Deponent further saith, that the said Defendants have many material and necessary Witnesses to examine in this Cause, and he saith that some of the Witnesses on the part of the said Defendants are now under examination in this Cause ; and this Deponent further saith, he hath made enquiry of the Examiner, and hath been informed by him, that it will be utterly impossible to get through

the Examination of the said Witnesses in less than one month from the present time, if he were to devote the whole of the intermediate time not now appropriated to other Causes, to such Examinations only; and this Deponent further saith, he believes that the said Defendants would be able to procure all such material and necessary evidence in support of their Case, as can be obtained in *England*, by the middle or end of *Trinity Term* next, but he saith he apprehends and believes that the same cannot be earlier completed; and this Deponent saith, that instructions have been some considerable time since sent to *Rome* to make search there for the Documents hereinbefore mentioned, and particularly for the Endowment of the said Vicarage; and he doth verily believe that such search is now in prosecution there."

Mr. Bell, and Mr. Stephen, now moved, upon this Affidavit, to enlarge Publication.

Sir S. Romilly, Mr. Wetherell, and Mr. Spence,
contra :—

The Suit has now been commenced five years, and they have had ample time for searching for Records. No further time ought to be granted. It is very improbable that they will be able to obtain any Records at the *Vatican*; if they thought so, they have had time to have searched there. There is no instance of a Tythe Cause being so long delayed on such pretences.

The VICE-CHANCELLOR:—

On such an Application, it is necessary to satisfy the Court that there has been no previous delay, and that the enquiries to be pursued are likely to further the ends of justice. I think the Affidavits in this Case

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meet these principles, and it is important in this Case to all Parties, that the Cause should be decided upon the most complete Evidence that can be obtained, so that the question may be finally settled. I shall grant the Motion, but the Defendants must pay the Costs of this application.

Motion granted.

**BATTERSBY v. SMYTH, SERJEANT, BRODIE,
and WILCOX.**

3d March.

A., B. and C.
agreed to purchase a Ship, and
that it should be registered in the
name of A. and
B. only, but the
Profits of the
Ship to be divided
by the three. C.
filed a Bill against
A. and B. for an
Account of the
Profits of the
Ship.

A general Demur-
rer was put in. On the ground
of public policy,
the Agreement
was held to be
illegal, and the
Demur-
rer allowed.

THE Bill stated, that in March 1817 the Defendants *Smyth* and *Serjeant*, together with the Plaintiff, agreed with *William Brown* for the purchase of a Vessel called the *Ariel*, for the sum of 1,200*l.* in Copartnership, in equal Shares, and that the Purchase Money should be paid thus: *Serjeant* to pay a Deposit of 100*l.* and accept Bills for the remainder of the Purchase Money by Instalments, the first to be paid by *Serjeant*, the second by *Smyth*, and the third and last by the Plaintiff:—That the first and second Instalments were paid, but the third has not, it not being due:—That upon such Purchase, it was agreed between *Smyth*, *Serjeant*, and the Plaintiff, as such Copartners, that the Plaintiff should have the management, and act as Husband of the Vessel, which the Plaintiff has ever since done, and has, in such capacity, expended Sums amounting to 143*l.* 14*s.* 8*d.* or thereabouts, for which no allowance has been made by his Copartners:—That since the

purchase of the Vessel, the same has made two voyages in the Coal Trade to the North of *England*, and has also gone laden with Ballast to *Newcastle-upon-Tyne*, whence she returned to the Port of *London* laden with Coal, and afterwards proceeded on a voyage to *Boulogne*, in *France*, whence she has lately returned with a valuable Cargo to the Port of *London*, where she now is waiting for the discharge of such Cargo:—That previously to the return of the Vessel from the last voyage, the Plaintiff declared his intention, on a final settlement of accounts between him and his Partners (but which could not take place until the return of the Vessel from her voyage) to give up or dispose of his Share and Interest in the Vessel:—That upon the purchase of the Ship, it was agreed that the Vessel should be registered in the names of *Sergeant* and *Smyth* only, and that they were to give the Plaintiff a Branch Bill of Sale; and such Agreement, and the nature of the transaction, was then entered in a Book by *Smyth*:—That after the purchase of the Ship, various Letters were written by the Captain or Commander of the same, respecting the Vessel, and addressed to the Plaintiff and the Defendants, *Sergeant* and *Smyth*, as such Copartners as aforesaid; and Plaintiff was also acknowledged, considered, and treated by *Sergeant* and *Smyth*, and all other persons, as a Copartner:—That no such Branch Bill of Sale was made, or given to the Plaintiff, according to the Agreement, although *Sergeant* and *Smyth* caused the Ship *Ariel* to be registered in their names only:—That the Freight and Earnings of the Vessel, in her last voyage, will amount to 1,000*l.* and upwards; to the whole of which, *Sergeant* and *Smyth* claim to be entitled, in exclusion of the Plaintiff, and they alone have employed the Defendant *Wilcox*, as their Broker, to get in

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and receive the Freight and Earnings of the Vessel in her last voyage; and he threatens and intends to pay over the same, together with what may hereafter be received by him, in respect of the Freight and Earnings of the Ship, to *Serjeant* and *Smyth*, in exclusion of the Plaintiff, who is jointly interested therein with them as Copartners.

The *Prayer* of the Bill was, for a Discovery of the matters aforesaid, and for an Account, and that an Allowance might be made to the Plaintiff for his time and trouble, as well as for the Money laid out by him when acting as Husband of the Ship, and that one-third of the clear Gains and Profits made by the Vessel since the purchase might be decreed to be paid to the Plaintiff; and in the meantime to provide for the payment of the Instalment agreed to be paid by the Plaintiff for his Share of the Ship, and that the Plaintiff may be indemnified from his liability in respect thereof, or that the Defendants *Serjeant* and *Smyth* may be decreed to make and execute a proper and effectual Branch Bill of Sale to Plaintiff, in pursuance of their Agreement; and that *Wilcox* might be ordered to account for what he has already received, or might afterwards receive, as such Broker, for the Freight, Earnings, and Profits of the Ship in and by her last voyage, and to pay what has been so received by him, and was, when he received Notice of the Plaintiff's Claim and Interest, or has since been, in his hands, together with what might thereafter be received by him, into Court, in Trust in the Cause; and that he might be restrained by Injunction from paying over to *Serjeant* and *Smyth* any Sums which had or might be received by him as such Broker; and that *Serjeant* and *Smyth* might be restrained from

bringing Actions against the Plaintiff in respect of the Instalment payable by him, until they shall have executed a Branch Bill of Sale, and until the final settlement of accounts.

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To this Bill the Defendant *Wilcox* put in a general Demurrer.

Mr. Pepys, in support of the Demurrer:—

This Ship not being registered in the name of the Defendant, he cannot be considered as one of the Owners of it, and cannot claim, as Owner, a share of the Profits of the Ship. *Thompson v. Leake* (a).

Mr. Willis, contra:—

The Property in the Freight of a Ship is distinct from the Property in the Ship, and may be in different persons. The Freight may be assigned without any regard to the *Registry Acts*, as was held in *Mestaer v. Gillespie* (b), and *Camden v. Anderson* (c). It follows, therefore, that this Plaintiff may, by Agreement, be entitled to a share in the Profits of the Ship, though not to a share in the Ship itself.

The Vice-Chancellor:—

No doubt a title to Freight may be acquired by Assignment, and that such Assignment is not within the Ship Registry Acts: but this is an Agreement that three shall buy a Ship; that it shall be registered in the name of

(a) *Ante*, vol. i. p. 39.

(c) 5 T. R. 709.

(b) 11 Ves. 629. S.C. M.S.

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two only; and that the three shall share the Profits of the Ship. The Case is new. My Opinion is, that on grounds of Public Policy, such an Agreement cannot be permitted. It is a stipulation contrived for the purpose of escaping from the provisions of the Registry Acts. The Demurser must be allowed.

HOLME v. CARDWELL.

7th March.
A Defendant, residing in the County Palatine of Lancaster, was attached for want of an Answer, and Cepi Corpus was returned by the Sheriff. The next proceeding is to move for a Messenger upon the return of Cepi Corpus, and afterwards, for a Sequestration

THE Defendant was resident in the County Palatine of *Lancaster*, and an Attachment issued for want of an Answer.

To this Attachment the Sheriff returned, *Cepi Corpus*.

An *Habeas Corpus* was then moved for, and the Sheriff returned that the Defendant "is not, nor at the time of issuing this Writ was, nor ever since hath been, in my custody."

The fact was, that when the Sheriff took the Defendant upon the Attachment, he suffered him to go at large upon Bail.

Mr. Pepys afterwards moved for a Serjeant at Arms;

observing, however, that the Books of Practice were silent as to the mode of proceeding in a Case like the present.

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The VICE-CHANCELLOR:—

You are not pursuing the right course. When a *Cepi Corpus* was returned by the Sheriff, you should not have moved for an *Habeas Corpus* (upon the return of which you can only find a proceeding against the Sheriff, and not against the Party), but for a Messenger; and if the Party be not taken by the Messenger, you may then proceed to a Sequestration. The Motion for the *Habeas Corpus* may be considered as irregular and a nullity, and you may move for a Messenger.

Mr. *Pepys* then moved for a Messenger against the Defendant, for want of an Answer, upon the Sheriff of *Lancaster's* return of *Cepi Corpus* to the Attachment; and an Order was accordingly made.

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9th March.
Order made, on Motion, that service of a Petition in Bankruptcy on the Attorney of a Person abroad, whose Debt was sought to be expunged, should be deemed good service.

A DEBT was proved under the Commission, by *Davis*, as due to the Partnership of *Davis* and *Ironside*.

Davis died, and a Petition was presented by the Assignees under the Commission, to expunge the proof.

Ironside was resident abroad, and it being therefore difficult to serve him with the Petition, an *Ex parte Motion* was made, that service of the Petition on the Attorney of *Ironside* might be deemed good service.

The Vice-Chancellor doubted whether any such Order could be made on Motion; but on *Ex parte Anderson in re Platt and another* (*a*), being cited, His Honor thought that Case an Authority, and made the Order.

(*a*) 1 Buck. 38.

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*Ex parte HUSTLER and another in re GOOD-
CHILD.*

9th March.

THE Petition stated that *John Jackson* and *William Jackson* carried on Business in *London*, as Ironmongers, under the Firm of *John and William Jackson*, and also carried on the Business of Bankers at *Durham*, in Partnership with *J. Goodchild the Elder*, *J. Goodchild the Younger*, *James Jackson*, *Thomas Jackson* and *John Jones*, under the Firm of *Jacksons, Goodchild and Co.*:—That on the 14th November 1815, a Commission issued against the latter Firm, and the Petitioners were chosen Assignees:—That *Thomas Gowland* purchased of *John and William Jackson* Goods to the amount of 191*l.* 1*s.* 1*d.* which was payable in October 1815:—That *John and William Jackson*, and *Gowland*, were in the habit of mutually accommodating each other by the Exchange, under Discount, of Bills, and balancing the Account of each Transaction by the payment of the difference of Interest accruing thereon:—That in May 1815, upon the application of *Gowland*, it was agreed between him and *John and William Jackson* that *Gowland* should accept a Bill, to be drawn upon him by the *Jacksons*, and dated the 25th May 1815, for 493*l.* payable two months after date thereof, against and in exchange for a Bill of Exchange for the like amount, dated the 11th May, drawn by the Firm of *Jacksons, Goodchilds and Co.* upon and accepted by the said

*G. accepted a Bill for J. and W. J. for 493*l.* and they gave him a Bill drawn by others on another Firm, but did not endorse the Bill. On the Bankruptcy of J. and W. J. the Acceptance of G. having been paid by him before their Bankruptcy, he was allowed to prove against their Estate, after deducting what he had received on the Bill given by them to G., such Bill being considered only as a Security.*

*J. and W. J. got G. to get discounted at the Bank a Bill for 853*l.* but they*

did not endorse the Bill. The proceeds of the Bill, when discounted, were paid to J. and W. J. The Bill was dishonoured, and G., as Indorser, paid the amount to the Bank. Held that G. was entitled to prove against the Estate of J. and W. J. after deducting what had been received under the Commission against the Acceptors of the Bill.

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Firm, payable sixty days after date, and endorsed by *M. Shout* and two other Persons; and, in consequence, such last mentioned Bill was delivered to *Gowland* by the *Jacksons*, without their Indorsement thereon; and *Gowland* accepted the Bill drawn upon him, and paid them the difference of Interest arising from his Acceptance becoming due at a later period than the Bill delivered to him:—That *Gowland* paid the Bill accepted by him, but *Jacksons, Goodchild and Co.* did not pay their Acceptance:—That *Gowland* proved against the Firm of *Jacksons, Goodchild and Co.* their Acceptance, and in his Affidavit stated “that the said Bill of Exchange was delivered to him in consideration of Money, to the full amount thereof, advanced and paid by said *Thomas Gowland* upon the Credit and Security of the same, and for which Sum of 493*l.*, or any part thereof, he had not, nor had any person by his order, or to his use, received any Security or Satisfaction whatsoever.”

The Petition also stated, that *Gowland* and the *Jacksons*, being in the habit of sending Bills to the Bank to be discounted for their mutual accommodation, *Wm. Jackson*, on behalf of himself and *J. Jackson*, on the 9th June 1815, sent to *Gowland* divers Bills, amounting to 2,000*l.* including a Bill for 853*l. 4s. 2d.* drawn by *A. Mackay* upon *Clementson, Borradaile and Co.* and endorsed by *A. Mackay*, but not endorsed by *J. and Wm. Jackson*, and requested *Gowland* to send them into the Bank to be discounted, who thereupon indorsed the Bills, and procured them to be discounted by the Bank, and paid the proceeds to *J. and Wm. Jackson*:—That the Bill of 853*l. 4s. 2d.* having been dishonoured by the Acceptors, *Clementson and Co., Gowland*, as the Indorser, paid the amount to the Bank.

The Petition then stated, that the Commissioners permitted *Gowland* to prove against the Estate of *John and William Jackson*, as Money paid and advanced for their use, the Amount of the two Bills for $493l. 1s. 6d.$ and $853l. 5s. 8d.$ after deducting therefrom the Sum of $191l. 1s. 1d.$ due from him for Goods sold, and deducting also a Sum of $319l. 19s.$ for Dividends received by him from the Estate of *Clementson and Co.*, leaving a Balance of $835l. 7s. 1d.$ upon which *Gowland* claimed to be paid a Dividend from the Estate of *J. and W. Jackson*:—That the Petitioners are advised that the Commissioners ought not to have admitted such proof against the Estate of *J. and W. Jackson*, by reason that the Bills of Exchange for $493l.$ and $853l. 5s. 8d.$ were not endorsed by them, and that the exchange of the said Bills for $493l.$ was in effect a mutual Purchase or Discount of each others Bills, and the amount paid by *Gowland* in discharge of his Acceptance was not Money paid for the use of *J. and Wm. Jackson*, but the price paid by him as the Consideration for the Bill accepted by *Jacksons, Goodchild and Co.* The Prayer of the Petition was, that the proof of $835l. 7s. 1d.$ might be expunged.

The Petition was supported by an Affidavit verifying the facts stated in the Petition.

There was also an Affidavit on the part of the Petitioners, to show, that the Bill for $853l. 4s. 2d.$ was the property of *Jacksons, Goodchild and Co.*, and that the Money received from *Gowland* upon his discounting it, was received by that Firm, and that the Firm of *J. and W. Jackson* was not connected with the Trans-

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action, and that neither the Bill or its Proceeds were entered in their Books.

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Mr. Cooke, in Support of the Petition :—

The Bill for 493*l.* was not endorsed by the *Jacksons*, and must be considered as purchased by *Gowland*, and therefore he has no right to prove in respect of it against the *Jacksons*.

The Bill for 853*l. 5s. 8d.* was discounted by the Bank, by the instrumentality of *Gowland*, for the *Jacksons*. Though *Gowland* endorsed the Bill to the Bank, and it was dishonoured and paid by *Gowland*, that gave him no right to prove against the *Jacksons*, who did not endorse the Bill.

Mr. Hart, contra, was stopped by

The VICE-CHANCELLOR :—

Gowland accepted the Bill for 493*l.* for the accommodation of the *Jacksons*, and paid this acceptance before their Bankruptcy. The Bill to the same amount, given by the *Jacksons* to *Gowland*, is substantially to be considered only as a Security ; and not having been fully paid, *Gowland* was entitled to prove for the difference.

Then as to the Bill discounted by *Gowland* at the Bank ; he indosed it at the instance of the *Jacksons*, and having obtained the Money upon his credit, he paid it to the *Jacksons* ; and thus became their Creditor for the amount. The Bill which he so indorsed and discounted, was, in respect of the Names upon it, to be

considered as his Security ; and to the extent in which he has not been indemnified by that Bill, he is entitled to proof. The Petition must be dismissed, but without Costs, the Assignees having been misled by the Affidavit made by *Gowland* on proving his Debt.

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A MOTION was made in this Cause, that the Demurrer put in by *Edward Smith Godfrey* to the Interrogatories exhibited to him by the Commissioners appointed to take his Examination as a Witness in this Cause, on the part of the Plaintiffs, might be over-ruled; by which Demurrer, as to the second Interrogatory so exhibited to him, he submitted, that he ought not to depose or to set forth his knowledge of the Transactions therein referred to, inasmuch as he the Examinant, at the time the same took place, was an acting Attorney and Solicitor, and was professionally employed and consulted in regard to the Contract enquired after by such Interrogatory, and the Transactions which took place in consequence, so far as the same were within his knowledge; and that all the Information which he the Examinant possessed of the several matters enquired after by that Interrogatory was acquired by him in consequence and in the course of such professional employment; and with respect to the 3d, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 15th, 16th and 17th Interrogatories, he the Examinant submitted to the Court, that he ought not to depose or to be examined in respect of any Deeds, Papers, Letters or

9th March.
Motion, that a Demurrer to Interrogatories by a Witness might be overruled, refused, not being supported by Affidavit.

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Writings referred to by several of the said Interrogatories, for the reasons stated in his Answer to the 2d Interrogatory; and that a new Commission might issue, directed to the same Commissioners as were named in the former Commission; and that the said *Edward Smith Godfrey* might be ordered to attend the said Commissioners, or any two of them, at such time and place as the said Commissioners, or any two of them, should appoint, and then and there submit himself to be examined to the several Interrogatories so demurred to by him as aforesaid; and that the return made by the Commissioners to the former Commission might be opened by one of the Six Clerks, not to either of the Parties in the Cause, and the Interrogatories thereupon to be attached to such new Commission; or that the said *Edward S. Godfrey* might be ordered to attend to be examined on the said Interrogatories by one of the Examiners of this Court; or that the Court might make such further or other Order in the Premises as to the Court should seem meet.

The *Solicitor General*, and Mr. *Sidebottom*, in support of the Motion:—

Mr. *Godfrey* is not entitled to object to answering these Interrogatories, for it is only necessary to look at them to be convinced that they are not such that an Answer to them would be divulging his Client's secrets. In *Sandsford v. Remington* (a), Depositions were referred to the *Master* to see what part came to his knowledge as confidential Attorney, in order to have that suppressed.

(a) 2 Ves. jun. 189.

Sir A. Pigott, and Mr. Bell, contra:—

Sandford and Remington has not been followed. This Solicitor must have an opportunity of showing that an Answer to these Interrogatories would be inconsistent with the duty he owes his Client.

The VICE-CHANCELLOR:—

Demurrs to Interrogatories are not treated in the same way as Demurrs to Bills, because they depend upon facts extrinsic (*b*). The Plaintiff insisting, by this Motion, that *Godfrey* is not entitled to the protection which he claims by this Demurrer, ought to have accompanied this Motion by an Affidavit, to satisfy the Court that the Interrogatories might be answered, without *Godfrey's* disclosing his Client's secrets, and then he would have had an opportunity of explaining how the Answer to the Interrogatories would be an infringement of the duty he owes to his Client. The Court cannot decide upon the mere language of the Interrogatories; for the facts, as stated in the Interrogatories, may appear to be such as the Witness is bound to speak to, and yet he may state grounds to

(*b*) The Demurrer in this Case was set down to be argued amongst Demurrs to Bills, but was ordered to be struck out of the Paper, as not being properly set down amongst such Demurrs. There are very few Cases on the subject, and the practice is obscure; see *Bowman v. Rodwell*, *ante vol. 1*, page 266. It appears, however, in *Kildealey v. D. Fisher, Moseley*, 195, and *Nightingale v. Dodd*, *ib. p. 228*, that such a De-

murr was set down, and came on to be argued like other Demurrs. A Defendant cannot demur to a Bill but for matter appearing in the Bill itself, but a Witness may demur for matters *dehors* the Interrogatory, because he has no other way to relieve himself but by Demurrer; but then the facts must be verified by Affidavit, *ib. 230*. In the principal Case, no Affidavits were filed in support of the Demurrer.

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show that he cannot answer the Interrogatories consistently with his duty to his Client. *Sandford v. Remington* affords no Rule to follow, because it is for the Court, and not for the Master, to judge whether the matter inquired of is confidential, and such as a Solicitor is not bound to answer.

Motion refused.

10th March.

By a Settlement previous to a Marriage, there was a Covenant by Husband, that his Executors should pay 3,000l. to Trustees, six Months after his death; and that if he should become a Bankrupt, that Sum should be proveable under his Commission.

By a Settlement made by the Wife, of her Property, before the Marriage, contingent Interests were given to the Husband.

The Husband became Bankrupt, and on a Petition, by the Trustees, to be allowed to prove the 3,000l. under his Commission; it was held, they could only prove to the amount of what the Husband's contingent Interest in the Wife's Property sold for under his Bankruptcy.

Ex parte YOUNG and others in re LARK and WOODLANDS.

THE Petition stated, that, by a Settlement, 25th November 1812, made previously to and in contemplation of Marriage, between *Lark*, the Bankrupt, of the first part; his intended Wife, then *Mary Gravenor*, of the second part; and the Petitioners, Trustees, of the third part; after reciting that upon the Treaty for said Marriage, and in consideration thereof, and of the Settlement to be thereupon made of the Property of said *Mary Gravenor*, and with a view to secure some provision, as well for said *Mary Gravenor*, in case such intended Marriage should take effect, and she should happen to survive the Bankrupt, as for the Issue of the Marriage in case there should be any, he the Bankrupt had agreed to settle and assure the Messuage and Premises in manner therein mentioned; and it was further agreed by the Bankrupt, that *Mary Gravenor* should, from and after his decease, have the use and enjoyment of all

such household Goods, Furniture, &c. as the Bankrupt should or might be possessed of at his decease, and which should be in his then or last place of residence, for the term of her natural life; and that he would covenant for payment, to the Trustees of his Settlement for the time being, of 3,000*l.* within six months after the decease of the Bankrupt, with Interest for the same from the time of his death, upon the Trusts therein declared respecting the same; It was Witnessed, that in pursuance and part performance of said Agreement, and in consideration of the Marriage, and of the Settlement made or intended to be made of the Property of said *Mary Gravenor*, and of 10*s.*, the Bankrupt bargained, sold, &c. to the Petitioners, their Executors, &c. a Leasehold Messuage (in the Settlement particularly described), upon Trust, to permit the Bankrupt and his Assigns to hold, occupy, receive and take the Rents and Profits during his life; and after his decease, upon Trust, in case *Mary Gravenor* should survive him, to permit her and her Assigns to hold the said Premises, and receive the Rents and Profits during her life; and after the decease of the Survivor of them, upon Trust, to assign and make over said Premises, and the Rents thereof, or such parts as should not have been applied under the powers contained in the Settlement, unto and amongst all and every, or any one or more, of the Children of the Bankrupt by said *Mary Gravenor*, as he should by Deed or Will direct; and in default of such directions, then as *Mary Gravenor*, in case she should survive the Bankrupt, should direct; and in default of such directions, equally amongst such Children; and in case there should be no such Children, or who should not live to take a vested Interest, in Trust, to transfer the Premises unto the Executors of the

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the Bankrupt, as part of his Personal Estate. And it was further Witnessed, that he the Bankrupt, for himself, his Heirs, &c. did covenant, promise, and agree with the Petitioners, their Executors, &c. that in case said intended Marriage took effect, and *Mary Gravenor*, or any Issue of said Marriage, should happen to survive the Bankrupt, the Heirs, Executors, or Administrators of the Bankrupt should and would, within six calendar Months next after his decease, pay to the Petitioners, or the Survivor of them, his Executors, Administrators, &c. the Sum of 3,000*l.* together with Interest from the decease of the Bankrupt; and it was agreed that the Petitioners should, immediately after the payment of the said 3,000*l.* stand possessed of the same, upon the same Trusts as the Leasehold Premises, with a power to invest 3,000*l.* in the Funds, in his life time, in discharge of his Covenant: " Provided also, and it was thereby agreed, that if *Lark* (the Bankrupt) should happen at any time after the Marriage, during his life, to fail in Trade and become Bankrupt, or otherwise insolvent, and compromise or compound with his Creditors, or make any Conveyance or Assignment of his Estate and Effects, in Trust, for their benefit, without having made such investment of said 3,000*l.*, then and whenever the same should so happen, said 3,000*l.* should be and become a Debt, immediately due and payable from the Estate and Effects of *Lark* (the Bankrupt), and in no case subject to the contingency of the Covenant thereinbefore contained for payment thereof; and then and in every or any such Case it should be lawful for the Trustees (the Petitioners) to prove said sum of 3,000*l.* as a Debt then actually due to them, under any Commission of Bankruptcy against *Lark*, and execute any Deed or Deeds of Trust or Composi-

tion, Conveyance or Assignment, for the benefit of the Creditors of *Lark*, as the case might be, and to accept and take a Dividend or Dividends for or in respect of such Debt, in liquidation or part payment thereof, but subject and without prejudice nevertheless to any remedy or means for the recovery of the residue of any of said Debt, together with the Interest thereof, which might be otherwise had, taken, or resorted to, upon or by virtue of said Covenant, for payment thereof as aforesaid." And further, that all such Dividends or other Monies as should so as last aforesaid be received by said Trustees, should be laid out in the public Funds, upon Trust, during the life of *Lark*, to pay the same to his Wife, for her own sole and separate use; and after the decease of *Lark*, to dispose of the Principal, upon the same Trusts as before declared respecting the 3,000*l.*; and in case *Mary Gravenor* should die in the life-time of *Lark*, then the Trustees to invest the Interest and Dividends, during the life of *Lark*, in the like Stocks, in addition and augmentation of the Principal; and the provision thereby made for *Mary Gravenor* it was agreed should be taken and accepted by her for her Jointure, and in lieu of Dower.

By another Indenture, 25th November 1812, between *St. Albyn Gravenor*, of the first part; *Mary Gravenor* (the Bankrupt's Wife), of the second part; *Lark* (the Bankrupt), of the third part; and Trustees, of the fourth part; in consideration of the intended Marriage, and the before-mentioned Settlement made by *Lark*, she the said *Mary Gravenor* covenanted and agreed with the Trustees, that in case the Marriage should take effect, twelve Shares of 100*l.* in the *Oxford Canal Navigation*, and 700*l.* Stock, should, within three

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Months after the death of her Mother, be transferred to said Trustees, upon Trust, to pay the Dividends unto *Mary Gravenor*, for her life, for her separate use; and after her decease, to pay the same to *Lark* (the Bankrupt) and his Assignees, for his life; and after the decease of the Survivor, upon Trust, for the Children of said Marriage; and in default of Issue, in Trust for *Langley St. Albyn*. And said *Mary Gravenor* thereby further covenanted with the Trustees, that her moiety of 3,287*l.* 1*s.* Navy Five per Cents., 200*l.* Three per Cents., 100*l.*, and the residuary Personal Estate of *Mary Langley*, deceased, should, within three Months after the death of said *St. Albyn Gravenor*, and *Mary* his Wife, be transferred to said Trustees, upon the same Trusts as the Canal Shares, &c. And said *Mary Gravenor* further covenanted with the Trustees, that a certain Legacy of 500*l.*, which she was entitled to, and the further Sum of 1,500*l.*, which she would become entitled to on attaining twenty-four, and all other the Property and Effects to which she then was or might at any time become entitled to, should be assigned to said Trustees, upon Trust, to invest the same in the Public Funds, or on Government or Real Securities, at Interest, and pay the Interest and Dividends to said *Mary Gravenor*, for her life, for her separate use, independent of her Husband; and from and after her decease, upon Trust, to pay the same to *Lark* (the Bankrupt) and his Assignees, for his life; and after his decease, upon Trust, to transfer the same to such person or persons as *Mary Gravenor* should by Deed or Will appoint; and in default of appointment, to the Executors, &c. of said *Mary Gravenor*:—That the Marriage took effect shortly afterwards, and *St. Albyn Gravenor* and his Wife are still living:—That since the Marriage, the

Legacy of 500*l.*, and 1,500*l.* to which the Wife of the Bankrupt became entitled on attaining twenty-four, were invested in the purchase of 2,095*l.* 11*s.* 6*d.* Navy Five per Cents. in the names of Trustees, upon the Trusts of the Settlement:—That a Commission issued against *Lark*, together with *Woodhead*, under which they were found Bankrupts, and Assignees were chosen; but no Dividend had yet been made:—That the Petitioners offered to prove, under the Commission, said Sum of 3,000*l.* so made proveable, in case *Lark* should become Bankrupt; but such proof was opposed by the Assignees, and the Commissioners refused to allow the proof. The *Prayer* of the Petition was, that the Petitioners might be admitted to prove said 3,000*l.* under the Commission, and be paid a Dividend or Dividends out of the separate Estate of *Lark*, rateably with the several other Creditors.

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Sir *Samuel Romilly*, for the Petition:—

This 3,000*l.* is proveable, it being a Settlement in respect of the Settlement made by the Wife of her property. *Ex parte Meagham* (a). The contingent Interest the Husband has under the Wife's Settlement of her Property, has been sold by the Commissioners.

Mr. *Cooke*, and Mr. *Beames*, *contra*:—

An Agreement to pay a Sum of Money in case of Bankruptcy, cannot be proved. Certainly the whole 3,000*l.* cannot be proved; but only to the amount of

(a) 1 Sch. and Lefr. 179. Ves. 598; and Lockye
See also *Ex parte Hinton*, 14 Savage, 2 Str. 947.

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what the Bankrupt's contingent Life Interest in his Wife's Property sold for.

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The VICE-CHANCELLOR:—

The Petitioners may prove to the amount of what the Bankrupt's contingent Life Interest, under the Settlement made by the Wife, sold for, but no more; *Ex parte Meaghams* is, so far, in point. If it were otherwise, great frauds might be practised on Creditors.

CROGGON v. SYMONS and others.

12th March.

Motion refused,
for an Injunction,
on filing an
Interpleading
Bill and Affidavit.

THIS was a Bill of Interpleader, with the usual Prayer; and on the filing of the Bill, and an Affidavit in support of it, Mr. Parker at the Seal (7th March), moved for an Injunction to restrain the Defendants from proceeding in Actions they had commenced against the Plaintiff; comparing the Bill to cases of Waste, and observing, that such an Injunction had been often granted on the filing of the Bill of affidavits (a).

The Vice-Chancellor said, it was not the ancient practice to grant an *Ex parte* Injunction in such Cases; and that he would confer with the Lord Chancellor on the subject.

(a) See Angell v. Hadden, *2 Ves. & Bea. 407.*
15 Ves. 244; Stevenson v.

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On this day (the 12th), *His Honor* said he had mentioned the matter to the *Lord Chancellor*, who inclined to be of opinion, that an Injunction could not be obtained on the filing of such a Bill, but desired a search might be made in the *Register's Office* as to the Practice.

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Mr. Parker :—

It is of importance that we should now have *Your Honor's Decision*, as the Trials are coming on immediately.

The VICE-CHANCELLOR :—

As the *Lord Chancellor* appears to agree with me in thinking that an Injunction to stay proceedings at Law, in an interpleading Suit, stands upon the same principle as an Injunction to stay proceedings at Law in any other Suit, I cannot grant this application (a).

(a) In a subsequent Case, acted upon this Rule, and in
Bailey v. Punard, 20th May several other Cases.

1818, the Vice-Chancellor

1818.*Ex parte FRY.*

14th March.

PROOF was offered before the Commissioners of a Debt of 5,000*l.*, which was refused. A Petition was presented for leave to prove a Debt of 10,000*l.*; but the *Vice-Chancellor* observed, that as the Petitioners had only offered to prove a Debt of 5,000*l.* before the Commissioners, they could not petition for leave to prove a Debt of 10,000*l.*; for it could not be considered as an Appeal from their Judgment, when 10,000*l.* was not offered to be proved before them.

Petition dismissed.

Ex parte PRICE, in re PALMER.

14th March.

A. granted an Annuity to B, secured by Bond and Warrant of Attorney. Two Years after he deposited a Lease with B. as

ON the 23d April 1811 the Bankrupt, *Palmer*, agreed to pay an Annuity of 40*l.* during his Life, in consideration of 400*l.*, and a Bond and Warrant of Attorney, of that date, was given to secure the same, and a Memorial of the Annuity was enrolled on the 26th of April.

a further Security for the payment of the Annuity. B. became Bankrupt. Held, that the subsequent Security need not be memorialized, and the usual Order was made for the Sale of the Lease, valuation of the Annuity, &c.

In April 1813 the Petitioner applied for a further Security for the due payment of the Annuity, whereupon the Bankrupt deposited a Lease with the Petitioner, as a further Security.

On the 30th March 1816 a Commission issued against *Palmer*, under which he was declared a Bankrupt.

The Annuity was paid only up to the 22d October 1815. The *Prayer* of the Petition was, for a reference to the Commissioners to value the Annuity, and to take an Account of the Arrears, and that the Lease might be sold, and the produce applied in satisfaction of so much of the Arrears and value of the Annuity, as the same (after payment of the Costs of the Petitioner and of the Assignees, occasioned by the Sale, and of the Petition,) would extend to satisfy; and that the Petitioner might prove the Remainder of the value of the Annuity.

Mr. Heald, for the Petition:—

The Petition would be of course, but for the circumstance, that two years after the Annuity was granted, and the Memorial registered, this Lease was deposited as a further Security: and it is objected, there ought to have been a Memorial of that Security; but that was unnecessary, and was not required by the Annuity Act. No Case has determined that a Memorial was necessary. If, at the time of the Agreement for the Annuity, it had been agreed to give this Security, the Memorial must have noticed it, but the Security was not thought of, or given, till two years after.

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Mr. Treslove, contra :—

This is not within the words of the Act, but according to the spirit of it, a Memorial was in this Case necessary.

The VICE-CHANCELLOR :—

This is an equitable Security for a Debt payable in the way of an Annuity. As the giving of the Security formed no part of the Agreement on the grant of the Annuity, it is not within the Annuity Act, and no Memorial was necessary.

Petition granted.

*Ex parte RATHBONE, Ex parte MYERS,
in re BROWN and another.*

14th March.

THESE Petitions came on upon a rehearing. The Petitions had been decided by Lord *Rosslyn*. They were exactly circumstanced, and involved the same point as was decided upon by Lord *Eldon* in *Ex parte Blackburn* (a), in the same Bankruptcy.

Mr. *Bell*, and Mr. *Bickersteth*, in support of the Petitioners.

Mr. *Cooke*, contra.

(a) 10 Ves. 204.

The VICE-CHANCELLOR:—

I concur altogether with the determination in *Ex parte Blackburn*. Lord *Rosslyn* took a distinction quite new, and never followed, viz. that if you take a Bill as a Security for a Debt, you must give up the Security, or the Debt will be discharged. I say with Lord *Rosslyn*, that the Bills were given as a Security for the Debts, but I hold with Lord *Eldon*, that the Party has a right to prove his Debt, after deducting what he has received in respect of the Bills. The Petitions, therefore, must be granted, and proof allowed as prayed; and the Petitioners must be paid Interest on the Dividends for the Sum proved, the Assignees having retained the Dividends, upon the Claim made under the Commission by the Petitioners.

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Ex parte PIGOU and another, in re HARVEY.

14th March.

*Sale of Goods,
to be paid for at
the end of the
year in which
they were pur-
chased, but if
paid for before
the end of the
year, 20 per cent.
Discount to be
allowed. They
were not paid
for within the
year, and held
on the Bank-
ruptcy of the
Purchaser, that
proof could not
be made of the
whole Debt,
without deduction
for Discount.*

THE Petitioners were Gunpowder Manufacturers, and sold Gunpowder to *Harvey*, the Bankrupt, to the amount of $2,144 l. 9s. 2d.$, who bought the same to sell again. The Gunpowder was to be paid for on a credit of twelve months, or 20 per cent. Discount upon prompt payment; the twelve months being calculated from the end of the current year in which the Sale of the Goods was made, and the Purchaser not entitled to the Discount unless Payment was made within the current year in which the Goods were purchased. The Account between the Petitioners and the Bankrupt was thus stated:—

	<i>£. s. d.</i>
Dec. 31, 1814:—To Balance remaining	98 14 8
To amount of Gunpowder supplied from 1st Jan. 1815 to 31st Dec. 1815	- 1,344 3 6
To amount of Gunpowder supplied 1st Jan. 1816 to 21st Feb. 1817	- 701 11 —
	<hr/> <hr/>
	£. 2,144 9 2

On the 1st March 1817 a Commission of Bankrupt issued against *Harvey*, under which he was found Bankrupt, and Assignees chosen. The Petitioners applied to prove the Debt, but the *Commissioners* refused to admit proof of the whole Sum of $2,144 l. 9s. 2d.$ insisting, that the Petitioners were bound to deduct 20 per cent. Discount from the amount of their demand, and only prove for the residue, but allowed a claim for the full amount till the opinion of the *Lord Chancellor* was

obtained. The Petition *prayed* that the Petitioners might be allowed to prove the whole of this Debt.

The Petition was supported by Affidavit.

The *Solicitor General*, in support of the Petition.

Mr. *Cooke*, and Mr. *Pemberton*, *contra* :—

The Case of *Ex parte Ainsworth* (a) is in point to show that the Commissioners were right in insisting upon a deduction of 20 per cent. That Case has been acted upon ever since by Commissioners.

The VICE-CHANCELLOR :—

It may be difficult, in legal reasoning, to arrive at the conclusion in *Ex parte Ainsworth*. Lord *Rosslyn* seems to have come to that Decision, as a rule of expediency, to avoid the Frauds which might otherwise be practised: and as that Case has ever since been acted upon, I shall not now depart from it. The proof must be as in that Case.

(a) See Mr. *Cooke's* Note p. 191, Ed. 5, and S. C. 4 of this Case, *Cooke's B. Law*, Ves. 678.

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1818.*Ex parte RICHARDSON and others, in re HODSON
and others.*

11th and 14th
March.

Testator disposes of his Property by his Will, and directs a Trade, in which he was concerned, to be carried on after his death. Held, that only the Testator's Capital in the Trade was liable to the Creditors of the Trade, who became such after the Testator's death, and that they had no further Claim upon his Assets.

ON the 25th March 1808, Articles of Partnership, for fourteen years, were entered into by *James Hodson* and *James Hargreaves*, in the business of Timber Merchants; and it was thereby agreed, that the Parties should advance, into one joint Stock, the following Sums; viz: *Hodson*, in the value of Timber and in Cash, 3,000*l.*, and *Hargreaves* 5,000*l.*, amounting together to 8,000*l.*, which was to be the Capital for carrying on the Business. *Hargreaves* was to receive Interest for the 2,000*l.* which he advanced towards the Capital, beyond that which *Hodson* advanced. The Profits of the Business were to be applied in payment of that Interest and of Rent, and then 10 per cent. on the Profits were to be paid to *Hodson*, as a compensation for his skill and trouble in the management of the Business; and the Balance of the Profits were to be added to the Capital of 8,000*l.* (unless the Parties otherwise agreed) until such Capital should amount to 10,000*l.*; and when the Capital was increased to that sum, the Profits were to be equally divided. It was also provided, that in case of the death of *Hodson*, the Partnership should cease; but if *Hargreaves* died before the expiration of the fourteen years, the Partnership was to continue between *Hodson* and such person as *Hargreaves* should, by any Writing in his life-time under his hand, or by his Will, declare to be his Successor in the concern, until the end of the term.

Hargreaves died 12th September 1812, having made his Will 9th June 1812. In substance it was thus:— he directed his Debts, Funeral Expenses, and the Charges of the Probate of his Will to be paid; and bequeathed to his Wife, *Mary Hargreaves*, for and during so much of her natural life as she should remain his Widow, an Annuity of 500*l.*, payable half-yearly: he then gave and devised to *W. M.*, *N. R.*, and *J. R.*, their Heirs and Assigns, Seven Messuages, at *Liverpool*; and some vacant and unbuilt Land upon Trust, to permit his Wife to receive the Rents during so much of her natural life as she should remain his Widow; and after her decease or marriage, upon Trust, to sell the same, with an option to his Son, *W. A. H.*, or if he should decline, to his Daughter, *M. C. H.*, to purchase the same at a valuation; and directed that the produce of the Sale, and the Rents and Profits in the mean time, should sink into and become part of the residue of his Estate and Effects, afterwards disposed of by his Will. He then gave to his Wife, for and during so much of her natural life as she should remain his Widow, all his other Messuages or Tenements in *Liverpool* (those only excepted which he afterwards devised to his Son, *W. A. H.*), and the use of all his Household Goods, Plate, &c.; but in case his Wife married again, he gave her for her life an Annuity of 250*l.*, payable half-yearly, and such parts only of his Household Goods and Furniture as she might choose, not exceeding in value 200*l.*; and after the death or second marriage of his Wife, he directed his Household Goods, &c. to be sold, and the produce to become part of the residue of his Estate and Effects. He then devised to his Son *W. A. H.*, his

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Heirs and Assigns for ever, all his new Brewhouse, &c., and the Messuage in the Testator's occupation, and all the Debts due to him at his decease in his business as a Brewer, contracted since his Son attained twenty-one, together with so much out of his Personal Estate as should amount to the Sum of 10,000*l.* The Testator then directed his Executors to place out and continue at Interest on Mortgage a Principal Sum, arising from his Personal Estate, sufficient to pay his Wife's Annuity of 500*l.*, or 250*l.* in case she married. And he gave his Executors the Sum of 5,000*l.*, or such other Sum as would produce by the annual Interest 250*l.*, upon Trust, to place the same on Mortgage, and apply the Interest for the use of his Daughter *M. C. H.*, from the time of his decease until she attained twenty-one, and on attaining twenty-one, he gave her 5,000*l.* at her own disposal; but in case she died under that age, leaving Issue, the same to go to such Issue at twenty-one; but if she left only one Child, then to go to such Child at twenty-one. He then gave his Executors 20,000*l.* Sterling, in Trust, to place the same at Interest, on Mortgage or in the Funds; and directed the Interest and Dividends to accumulate until his Daughter attained twenty-one, and after that time to stand possessed of that Sum and the accumulations, for his Daughter during her life; and after her decease, in trust, for the Issue of his Daughter, if more than one, as Tenants in Common, payable at twenty-one; but if only one Child, to such Child, their, his, or her Executors, &c.; but if his Daughter should die under twenty-one, without Issue, then, in Trust, to stand possessed of the 20,000*l.* and Accumulations, and also of the 5,000*l.* and the Aceu

mulations, for the benefit of his Wife during so much of her natural Life as she should continue his Widow. In case his Daughter should die without Issue who should live to attain twenty-one, the 20,000*l.* and the Accumulations not then disposed of, to sink into the Residue; and in like manner, in case his Daughter should die under twenty-one, without having Issue who should attain twenty-one, the Sum of 5,000*l.*, which she would be absolutely entitled to at twenty-one, should sink into the Residue, subject, as to the said Sum of 20,000*l.*, to the Life Interest of his Wife, in the event of her continuing his Widow as aforesaid. He then gave his Daughter, after the decease of his Wife, his Plate, if she attained twenty-one, but in case she died under that age, he bequeathed the same to his Son, if then living. He then gave a Horse to his Wife; to his Nephew, *H. H.*, 25*l.* per Annum until twenty-four, when he gave him 500*l.* He gave also unto each and every of his the Testator's Children, living at his decease, or born in due time afterwards, the Sum of 5,000*l.* payable at twenty-one, with a provision for maintenance in the mean time. The Will then proceeded thus:—"And whereas it is my Will that the Residue of my Estate and Effects, Real, Leasehold, and Personal, shall, from the time of my decease, accumulate for the benefit of my said Son and Daughter, and their respective Issue, in equal Moieties, and that the Rents and Interest thereof shall not be received by them until the attainment to the age of thirty years, except in the case of Marriage, with the consent of his Executors or a majority of them, in which event they should be entitled to the Rents and Interest thereof at their ages of twenty-one; Now I do hereby give and devise all the rest, residue and remainder of

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my Estate and Effects, Real, Leasehold, and Personal, unto my Executors hereinafter named, their Heirs, Executors, &c., upon Trust as to one Moiety thereof, for the benefit and advantage of my said Son during his Life, from and after attaining thirty, or twenty-seven years, in case of his Marriage before twenty-seven, with the consent of his Executors or a majority of them; and from and after the decease of my said Son, then in trust for the Children of my said Son who should be living at the time of his decease, and the Issue of such of them as should be then dead (such Issue taking their deceased Parents' share), as Tenants in common, their Heirs, Executors, &c.; and upon Trust, as to one other Moiety thereof, for the benefit and advantage of my said Daughter from and after her attainment to the age of thirty years, or twenty-seven years, in case of her Marriage before her age of twenty-seven, with the consent of my Executors hereinafter named, or a majority of them; and from and after her decease, in trust for the Children of my said Daughter who shall be living at the time of her decease, and the Issue of such of them as shall be then dead, (such Issue taking their deceased Parents' share), as Tenants in common, their Heirs, &c. It is my Will, and I hereby direct, that in case my said Son or Daughter shall die without lawful Issue, the Fortune by me given and devised to him or her for Life shall go to the Survivor, his or her Heirs, Executors, Administrators and Assigns, subject nevertheless to the Life Estate of my said Wife therein as hereinbefore provided for her, in the event of her surviving my said Daughter and continuing my Widow; and that in case my Daughter shall die under twenty-one, without leaving Issue, the said Sum of 5,000*l.* hereinbefore given to

her, shall in like manner go over to my said Son, his Executors, &c.; but if my Son and Daughter shall both die without leaving lawful Issue, or either of them, or any Brother or Sister to be born surviving them, I give and devise all the said rest and residue of my said Estate, Real, Leasehold, and Personal, together also with the said Sum of 5,000*l.* in the event of my Daughter dying under twenty-one years of age, and the said Sum of 20,000*l.* hereinbefore bequeathed to, or in Trust for him and her Children, subject as aforesaid, unto my Nephews *W. H.* and *R. H.*, &c.; and to my said Nephew *J. H. H.*, and to my Nieces *M.-D.* and *S. H.*, their Executors, &c. as Tenants in Common; but in case my said Niece *M. D.* shall die without leaving lawful Issue, or to the Issue of any Child, it is my will that her One-fifth part of the said Property shall go to, and I hereby give and devise the same from and immediately after her decease, unto my said Nephew *J. H. H.*, his Heirs, Executors, Administrators and Assigns for ever." The Testator then directed, that in case of any deficiency of his Wife's Income of 500*l.* per Annum, or 250*l.* in the event aforesaid, should be made good out of his Son's Moiety of the Residue; and he directed that the 20,000*l.* given in Trust for his Daughter should be laid out in the purchase of a Freehold or Copyhold Estate of Inheritance, upon the Trusts before mentioned; and that the whole residue and remainder of his Personal Estate should be placed out at Interest upon Mortgage, in the names of his Executors, as often as the same should amount to 300*l.* It was his further Will, that the Fortune bequeathed to his Daughter (the 5,000*l.* excepted) should be for her sole and separate use; and further, that in case his Son should be unfortunate in Business, or otherwise embarrassed, it

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should be in the power of his Executors to advance him from time to time any Sum or Sums of Money from the Rents, Interests, and Dividends of his Moiety of the Residue, not exceeding one-half of the yearly amount. The Will then proceeded thus, "*I declare that my Executrix and Executors shall be my Successors, for the benefit of my Estate, in a Business, which I now carry on in Partnership with James Hodson, of Liverpool, Timber Merchant, under certain Articles of Partnership.*" He then gave a Legacy of 30*l.* to *E. A.*, and appointed his Wife, and *W. M.*, *N. R.* and *J. R.*, Executrix and Executors of his Will, and gave to the Executors 50*l.* each; and declared that the Receipt of his Trustees should be a full discharge to Purchasers, and that his Executors should not be chargeable for any losses which might happen to his Estate without their wilful default, nor for more than they should severally actually receive, but only for his and their own acts; and that they should retain their expenses in the performance of the Trusts of the Will.

By a Codicil to his Will, 2d September 1812, he gave a further Annuity to his Wife of 300*l.* during her Life.

The Executors of *Hargreaves* declined to carry on the Business; but *Mary Hargreaves* the Executrix, at the instance of her Son and Daughter, agreed to continue the Business, which was done accordingly, under the management of *Hodson*; and on the 16th June 1813, *Mary Hargreaves* alone proved the Will of her Husband, the Executors declining to act as such, if the Business was carried on.

At *Hargreaves'* decease there was due to him, on the Balance of his Account of Capital brought into the concern, 7,145*l.* 18*s.* 11*d.*, and to *Hodson*, 2,377*l.* 13*s.* 5*d.*, exclusive of their respective Shares of the Profits of the Business, which were adjusted up to *Hargreaves'* death, and amounted to 18,567*l.* 1*s.* 10*d.*

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In the beginning of the year 1815, the Partnership sustained heavy losses, by a fall in the price of Timber and otherwise; and *Hodson* applied to *Mary Hargreaves* for a further advance of Money; and in consequence, she, as the Executrix of her Husband, sold out Stock, which produced 9,064*l.* 2*s.* 8*d.*, which was paid to *Hodson*, and for which the Executrix had Credit in the Partnership Books, in the Account which contained the particulars of Capital advanced by the Testator in his life-time; and shortly after, a further advance was made to the Concern of 2,360*l.* 3*s.* 11*d.*, the produce of part of the Testator's Stock; and for which like Credit was given in the Partnership Books.

Between the period when the two Advances were thus made, a Security was executed by the Bankrupts to the Trustees in the Settlement made previous to the Marriage of the Testator's Daughter, 17th April 1815, for the Sum of 2,850*l.*, of certain Real Property belonging to the Copartnership, purchased with their Funds; which Security was given in part of the Sum of 5,000*l.* bequeathed by the Testator to his Daughter.

On the 24th August 1817, a Commission issued against *Hodson* and *Mary Hargreaves*, under which they were found Bankrupts; and Assignees were chosen.

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At a Meeting of the Commissioners, 25th November 1817, *Mary Hargreaves* proved a Debt of 8,844*l. 6s. 7d.* for so much Money by her, as Executrix, lent and advanced, out of her late Husband's Estate, to herself and *Hodson* before the Bankruptcy; being the before two mentioned Sums of 9,064*l. 2s. 8d.* and 2,603*l. 11s.* after deducting the Amount of the Security given to the Trustees of the Daughter's Settlement.

The Partnership obtained great Credit in consequence of *James Hargreaves* being a Partner, and from the representations made, after his death, that his Representatives continued to be Partners in the Concern; and *Mary Hargreaves*, in confirmation of such representations, sent a Note to *J. Moss*, Esquire, Banker, in *Liverpool*, at the request of *Hodson*, representing that she was sole Executrix of her Husband, in consequence of which she had full power to act as a Partner in the Concern of *Hodson and Co.*, and in whatever way she might judge to be beneficial to the interest of the Estate.

Under these circumstances the present Petition was presented by the Petitioners (the Assignees of the Bankrupts), they being advised that *Mary Hargreaves* was not entitled to prove the aforesaid Sum of 8,844*l. 4s. 7d.*, or any other Sum of Money, as a Debt under the Commission, until all the other Creditors of the Concern were paid; because the Monies advanced by her as Executrix, were for the purpose of paying the Debts of the Copartnership, contracted by *Hodson*, by virtue of and under the Articles of Partnership, to the performance of which the personal Representatives of *Hargreaves*

were bound, under the Covenants therein contained, and of the Directions given in and by his Will. The Prayer of the Petition was, that the Proof might be expunged.

Sir S. Romilly, Mr. Cooke, and Mr. Bickersteth, for the Petitioners:—

The Profits of this Trade were to form part of the Testator's Assets; and the Trade being directed to be carried on by the Executrix, she was entitled to employ part of his Assets in support of the Trade. The Legatees, the Son and Daughter, could not be paid the Legacies left to them by the Testator, unless out of the Profits of this Trade; it was carried on for their benefit, and they must be considered as Partners. The principal Legacies left to the Son and Daughter were not payable until twenty-seven if married, or at thirty if unmarried, which was about the time the Articles of Partnership would expire. In *Ex parte Garland* (a), Lord Eldon puts this Case: “A Tradesman directs the Trade to be carried on for the benefit of a Son, giving him a Legacy of 50,000*l.* It is difficult to say, that Legacy must not be liable; and yet it is very difficult to say it shall be liable, consistently with saying, Legacies to others shall not; unless upon this, that the Legacy is given by the same Will, for the benefit of the same Person, who is to have the benefit of the Trade.” When a Testator directs a Trade to be carried on, his Assets are liable to the Debts of that Trade; and if he directs it to be carried on for the benefit of certain individuals, they become Partners in the Trade. In *Hankey v.*

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Hammock (b), the Testator's Assets were held liable to the Creditors of the Trade directed by the Testator to

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(b) That Case is referred to under the name of *Hankey v. Hammond*, in Mr. Cooke's B. L. p. 67, ed. 5, and by the *Lord Chancellor* in *Ex parte Garland*, 10 Ves. p. 113 in Note, and Ib. p. 119. Mr. Cooke, in the course of his Argument, said, he thought the *Lord Chancellor's* Note of the Case was taken at the *hearing* of the Cause, but that his Note was made when the Cause came on for *further directions*. The following state of that Case, when it came on for further directions, is taken from the Register's Book, 30th Nov. 1786. "This Cause having received a hearing on the 2d Dec. 1784, before the *Master of the Rolls*, in the presence of Counsel, and the Pleadings being then opened, and the scope of the Plaintiff's Bill being, that an Account might be taken of the several Debts which had been contracted and become due to the Plaintiffs in the course of carrying on the trade in the Pleadings mentioned, and an Account thereof which remained unsatisfied; and that what should appear to be due on the taking of such Ac-

" count might either be paid by the Defendants, or some of them, by and out of the Sums of Money, Stock, and Effects belonging to the said Trade, or employed therein, since the death of the Testator *John Hammock*, in the Pleadings mentioned, come to the hands of the Defendants *John Ruse* and *Thomas Jackson*, his Executors, or by and out of the Estate and Effects of the said Testator; and that an Account might be taken of the several Sums of Money come to the hands of the said Defendants, or either of them; and that an Account might also be taken of all the said Testator's Debts and Funeral Expences, and an Account of his personal Estate possessed by the said Defendants; and that his personal Estate might be applied in a course of Administration; and that the Plaintiffs might be paid their demands, either out of the Fund aforesaid, or out of the general personal Estate of the said Testator; the Plaintiffs for those purposes (amongst other things) charging that the said *John*

be carried on after his death. It is true, that in *Ex parte Garland*, the *Lord Chancellor* appears to have

" Hammock, a Corn Chandler
" and Lighterman, being pos-
" sessed of a very considerable
" personal Estate, made his
" Will, bearing date the 29th
" day of December 1777, and
" thereby(among other things),
" after directing payment of his
" Debts and Funeral Expences,
" bequeathed to his Children
" some pecuniary Legacies, as
" therein mentioned, and ap-
" pointed the Defendants, *John*
" *Ruse* and *Thomas Jackson*,
" joint Executors of his said
" Will; and as concerning the
" Residue of his Effects and
" Estates, both real and per-
" sonal, (after payment of his
" Debts, Funeral Expences,
" and Legacies,) he devised
" and bequeathed the same
" unto his Wife, the Defendant
" *Sarah Hammock*, for her own
" use, for her Life, provided
" she should so long continue
" his Widow; and desired that
" she should carry on his said
" Trade and Business for the
" benefit of herself and Chil-
" dren; and from and after the
" Decease or Marriage of his
" said Wife, which should first
" happen, or if she should enter
" into Partnership with any
" Person or Persons after his
" decease, then and in either

" of the said Cases, he directed
" his said Executors to sell all
" his said residuary Effects and
" personal Estate, and to lay
" out the Monies arising by
" Sale thereof in the public
" Funds, or other good Secu-
" rities, as his said Executors
" should think fit, and to apply
" the Interest and Profits there-
" of for the benefit of his Chil-
" dren as therein mentioned;
" and the said Testator directed
" that if, upon examination of
" his Businesses, and a strict
" inquiry into the state of his
" Affairs, it should be found
" that his Trade should be de-
" clining, and in a losing way,
" then all his said residuary
" Estate, except his Buildings
" which he had by Lease or
" Leases, should be sold, and
" his said Buildings let by his
" said Executors for the benefit
" of his said Wife and Children
" until the youngest of his
" Children should attain the
" age of twenty-one years, and
" that the same should be sub-
" ject to and under the like
" directions and appointment
" as his said residuary Estate:
" —That the said *J. Hammock*
" afterwards died, and the De-
" fendants, *John Ruse* and
" *Thomas Jackson*, proved the

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overruled that Decision; but the Cases were different; in the latter case 600*l.* was directed, if necessary, to

" said Will; and the said Defendant *Sarah Hammock*, " Widow of the said Testator, " in pursuance of the directions " of the said Will, by and with " the permission of the said " Executors, entered upon the " said Leasehold Premises and " the said Stock in Trade, " and she or the said Execu- " tors also possessed the whole, " or so much of the rest of the " personal Estate of the said " Testator as she could, and " sufficient to satisfy his Fu- " neral Expences and Debts, " with a very considerable " surplus, and, in particular, " possessed various Sums of " Money which were due to " him at the time of his de- " cease, and carried on the " said Trade for the space of " two years:—That the said " Defendant *Sarah Hammock*, " in the course of carrying on " the said Trade, became in- " debted to the Plaintiffs, and " to several other Persons, " in considerable Sums of " Money:—That the said " Defendants *John Ruse* and " *Thomas Jackson*, the Exe- " cutors, in the year 1780, " thought proper to put a stop " to the said Defendant *Sarah*
Hammock carrying on the " said Trade, as being a losing " Business, and, in consequence " thereof, possessed themselves " of the whole, or so much of " the Stock and Effects then " used in the said Trade, as " they could, and sold the said " Stock and Effects so employ- " ed in the said Trade at the " time the same was stopped: " —That the said Debts so due " to Plaintiffs were contracted " only in the course of the said " Trade, and for the benefit " thereof, and upon the credit " of the said Testator's Will, " and therefore the Stock and " Effects belonging to the said " Trade, or employed therein " at the time the same was " stopped, which came to the " hands of the said *John Ruse* " and *Thomas Jackson*, or the " Estate and Effects of the said " Testator, ought to be liable " to make good the Debt con- " tracted with the Plaintiffs on " account of the said Trade:— " That by virtue of the said " Will, or the directions therein " contained, the Stock and Ef- " fects belonging to the said " Testator at the time of his " decease, and employed in the " said Trade, became, or ought " to be considered, as charge- " able with the Money neces-

be advanced for the purpose of the Trade; plainly implying that only so much of the Personal Estate should

"sary for supplying the exigencies thereof; and as the said Defendant *Sarah Hammock*, not having any Property of her own, could not carry on the said Trade otherwise than upon the credit of the said Stock and Effects; and that the same, or the Testator's other Estate and Effects, or a competent part thereof, ought to be applied in discharge of the Debts contracted with the Plaintiffs for the purpose of carrying on the said Trade. Whereupon, and upon debate of the matter and hearing what was alleged by the Counsel on both sides, *His Honor* did order that it should be referred to Mr. *Holford*, one of the Masters of this Court, to inquire and state to the Court whether any and what Debts of the said Testator *John Hammock*, at the time of his death, then remained due and unsatisfied, and to whom, and what was the amount thereof; and the said Master was also to inquire and state to the Court what Debts were contracted by the Defendant *Sarah Hammock*, in carrying on the said Testator's said Trade or Business

"since his death, and the amount thereof: and it was ordered, that the said Master should also inquire and state to the Court what was the value of the Stock in Trade, Debts, Goods, and Effects possessed by the Defendants *John Ruse* and *Thomas Jackson*, son, his Executors, at the time they stopped and put an end to the said Trade or Business, as admitted by their Answer; distinguishing how much there belonged to the said Testator at the time of his death, and how much thereof was acquired by the said Defendant *Sarah Hammock*, in the course of carrying on the said Trade or Business after the said Testator's death; and for the better discovery of the matters aforesaid, the usual directions were given: and *His Honor* did reserve the consideration of the Costs of this Suit, and of all further directions, until after the said Master should have made his Report; and any of the Parties were to be at liberty to apply to the Court, as there should be occasion:—That in pursuance of the said Decree the said Master, on the 17th day of

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be applicable to the Trade. In this Case there is no limitation of the liability of the Testator's Assets.

" July 1786, made his Report,
" (which stands absolutely con-
" firmed by an Order, dated
" 30th day of Oct. 1786), and
" thereby certified, that he had
" made his inquiries by the said
" Order directed, and that he
" had caused two several Ad-
" vertisements to be published
" in the *London Gazette*, for
" the unsatisfied Creditors of
" the said Testator, and the
" Creditors of the said *Sarah*
" *Hammock*, his Widow, which
" arose by her carrying on the
" Trade or Business of her said
" Husband after his death, to
" come in before him, and
" prove their respective Debts,
- " by a time in the last of the
" said Advertisements limited
" (and some time since passed),
" or in default thereof, that
" they would peremptorily be
" excluded the benefit of the
" said Decree; but no Debt or
" Sum of Money had been
" claimed before him to be due
" or owing from the said Tes-
" tator at the time of his death;
" and it did not appear to him
" that there was any Debt or
" Demand of the said Testator
" remaining unpaid; but sev-
" eral Debts had been claimed
" before him to be due and
" owing by the said Defendant
" Sarah Hammock, as Debts
" contracted by her in the
" course of carrying on the
" Trade or Business of her said
" Husband after his death; the
" particulars whereof, which
" he found to be due on that
" account, he had set forth in
" the first Schedule to his said
" Report annexed, and to whom
" due respectively, which a-
" mounted together to the Sum
" of 65*l.* 2*s.* 7*d.*: And he
" further certified, that the
" Plaintiffs, *Thomas Hankey*,
" *Joseph Chaplin Hankey*, *Ste-*
" *phen Hall*, and *Robert Han-*
" *key*, had claimed before him
" the Sum of 13*l.* 9*s.* 5*d.*:
" that the said Plaintiffs, *Joseph*
" *Shimpton* and *John Green-*
" *rig*, had also claimed the
" Sum of 13*l.* 2*s.* 7*d.*; and
" the said Plaintiffs, *John Ed-*
" *wards*, *Henry Brown*, and
" *Edward Brockopp*, had also
" claimed the Sum of 9*l.* 18*s.*,
" as for the Costs taxed upon
" the several Judgments ob-
" tained by them respectively
" against the said Defendant
" *Sarah Hammock*, as mention-
" ed in the first Schedule to his
" said Report, to be added to
" their respective Debts in the
" said Schedule mentioned and
" set forth; but which said se-

Mr. Bell, contra:

The Petitioners are bound to show that the Assets

"veral Sums of Money, so
"claimed by the said Plain-
"tiffs for the said Costs, he did
"not consider himself at liber-
"ty to allow as Debts con-
"tracted by the said Defendant
"Sarah Ham...ock, in carrying
"on the said Testator's Trade
"or Business since his death;
"the Actions upon which the
"said Judgments were respec-
"tively obtained having been
"commenced after the said
"Trade was stopped and put
"an end to, as in the Plead-
"ings of this Cause mentioned.
"And the said *Master* further
"certified, that he found that
"the said Testator, at the time
"of his death, was possessed
"of certain Warehouses, Mills,
"and Kilns, for the housing,
"grinding, and drying of Corn
"and Grain, and of the House
"wherein he lived, situate in
"Shad Thames, Southwark,
"held by two Leases, one dated
"23d May 1744, for 61 years,
"at the yearly reserved Rent
"of 6*l.* 6*s.*, and the other
"dated 7th December 1755,
"for 61 years, at the yearly
"reserved Rent of 5*l.* 5*s.*; on
"which said Premises he did
"not find that any value was
"put at the time the said De-
"fendants, *John Ruse* and

"Thomas Jackson, put an end
"to the said Trade or Business;
"but he found that the said
"Defendants had received the
"Rent thereof from that time,
"at and after the rate of 100*l.*
"per annum; the particulars
"whereof, and of such other
"Sums of Money as had been
"received by the said Defen-
"dants, *John Ruse* and *Thomas*
"*Jackson*, as and for the value
"of the Stock in Trade, Debts
"Goods and Effects belonging
"to the said Testator at the
"time of his death, he had
"set forth in the second Sche-
"dule to his said Report an-
"nexed, which amounted in
"all to the sum of 672*l.* 10*s.*;
"but the said Defendants hav-
"ing paid, laid out, or dis-
"bursed for the Ground Rents
"of the said Premises, and for
"the Land or King's Tax in
"respect thereof, and for in-
"suring the said Premises
"from Fire, and for valuing
"and appraising the said Stock
"in Trade, and for an Annuity
"of 16*l.* per annum to Mrs.
"*Wright*, secured by the said
"Testator's Bond, and other-
"wise, the several Sums of
"Money mentioned and set
"forth in the third Schedule
"to his said Report annexed,

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of the Testator were liable to the Debts of the Trade; for if not, the Executrix was not justifiable in making

" amounting in all to the Sum
" of 173*l.* 5*s.*, which being de-
" ducted from the said Sum of
" 672*l.* 10*s.* (the amount of
" the said second Schedule),
" there remained in the hands
" of the said Defendants *John*
" *Ruse* and *Thomas Jackson*, in
" respect of the value of the
" said Stock in Trade, Debts,
" Goods and Effects belonging
" to the said Testator at the
" time of his death, and of the
" produce thereof, possessed
" by them, on balance, the
" Sum of 499*l.* 5*s.*; and he
" found that the said Defen-
" dants, *John Ruse* and *Thomas*
" *Jackson*, received as and for
" the value of the said Stock
" in Trade, Debts, Goods and
" Effects acquired by the said
" Defendant *Sarah Hammock*,
" in the course of carrying on
" the said Trade or Business,
" the several Sums of Money
" mentioned and set forth in
" the fourth Schedule to his
" said Report annexed, amount-
" ing in all to the Sum of
" 801*l.* 13*s.* 8*d.*, whereout the
" said Defendants having paid
" for collecting and getting in
" the Debts due to the said
" Trade, and for settling the
" Accounts in respect thereof,
" and otherwise, the several
" Sums of Money mentioned
" and set forth in the fifth
" Schedule to his said Report,
" amounting in all to the Sum
" of 113*l.* 19*s.* 10*d.*, which
" being deducted from the said
" Sum of 801*l.* 13*s.* 8*d.* (the
" amount of the said fourth
" Schedule), there remained
" in the hands of the said De-
" fendants *John Ruse* and
" *Thomas Jackson*, in respect
" of the Sum of Money re-
" ceived by them as and for
" the value of the said Stock
" in Trade, Debts, Goods and
" Effects acquired by the said
" Defendant *Sarah Hammock*,
" after the said Testator's
" death, on balance, the Sum
" of 687*l.* 13*s.* 10*d.*, and the
" before-mentioned Balance of
" 499*l.* 5*s.*, being added to-
" gether, they made the Sum
" of 1,186*l.* 18*s.* 10*d.*; but
" he found that the Defend-
" ants *John Ruse* and *Thomas*
" *Jackson*, on the 3d May
" 1781, paid for the purchase
" of 850*l.* Bank Three per
" Cent. Annuities, and Com-
" mission, the Sum of 486*l.*
" 19*s.* 6*d.*; and on the 14th
" day of August, in the same
" year, that the said Defend-
" ants paid for the purchase of
" 250*l.* like Annuities, and

the Advances. By carrying on the Trade, she became herself responsible to the Creditors; but the Creditors

" Commission, the Sum of
 " 140*l.* 6*s.* 3*d.*; such Sums so
 " paid for the purchase of the
 " said Annuities, making to-
 " gether the Sum of 626*l.* 18*s.*
 " 9*d.*, he found were part of
 " the Monies received and
 " possessed by the said De-
 " fendants, belonging to the
 " said Trade; and the same
 " being deducted from the said
 " Sum of 1,186*l.* 18*s.* 10*d.*
 " (the total amount of the said
 " Balances), reduced the same
 " to the Sum of 560*l.* 0*s.* 1*d.*;
 " and he found that the De-
 " fendants, *John Ruse* and
 " *Thomas Jackson*, had received
 " the Interest of the said 850*l.*
 " and 250*l.* Bank Three per
 " Cent. Annuities since the
 " purchase thereof as aforesaid,
 " which, to the 5th January
 " last, amounted to the Sum of
 " 161*l.* 5*s.*, and being added
 " to the said last-mentioned
 " Sum of 560*l.* 0*s.* 1*d.*, made
 " together the Sum of 721*l.*
 " 5*s.* 1*d.*, which Sum he found
 " was then due from the said
 " Defendants, *John Ruse* and
 " *Thomas Jackson*, on balance
 " of the aforesaid Accounts;
 " and the same, with the said
 " 850*l.* and 250*l.*, making to-
 " gether 1,100*l.* Bank Three
 " per cent. Annuities, was the

" clear net amount of the Stock
 " in Trade, Goods and Effects,
 " belonging to the said Testa-
 " tor, and acquired by the said
 " *Sarah Hammock*, at the time
 " the said Defendants stopped
 " and put an end to the said
 " Trade and Business, and of
 " the produce thereof, over and
 " besides the before-mentioned
 " Warehouses, Mills, Kilns, and
 " Dwelling-House. And this
 " Cause coming on this present
 " day to be heard before *His*
 " *Honor*, for further directions,
 " and as to the matter of Costs,
 " reserved by the said Decree,
 " in the presence of Counsel on
 " both sides, upon debate of the
 " matter, and hearing the said
 " Decree, dated 2d December
 " 1784, the said *Master's Re-*
 " *port*, dated 17th July 1786,
 " the Probate of the Will of
 " the said *John Hammock*,
 " dated 29th December 1777,
 " read, and what was alleged
 " by the Counsel on both sides,
 " *His Honor* doth Order, that
 " it be referred back to said
 " *Master*, to tax the Plaintiffs
 " their Costs of this Suit, from
 " the date of the Order of
 " 28th July 1784, and to tax
 " the Defendants their Costs
 " prior and subsequent to the
 " said Order; and that such

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RICHARDSON
 and others,
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and others.

have no claim upon the Assets of the Testator, except to the extent he has made them liable by his Will. By this Will, the Assets are not made liable to the Trade. The Capital in the Trade was all that can be liable. It was all the Testator thought necessary to embark in the Trade. The Testator has given several Legacies by the Will, and has expressly bequeathed the residue of his Estate and Effects. It was the duty of the Executrix to appropriate a sufficient part of the Testator's Effects for the payment of these Legacies. On a Bill filed for that purpose, they would have been compelled to do so. *Ex parte Garland* is an express authority, that when a Testator directs a Trade to be carried on, only the Property declared to be embarked in the Trade, is answerable to the Creditors of the Trade.

Sir S. Romilly, in Reply :—

In *Ex parte Garland* the Partnership was for an indefinite period, but here it is limited. In *Hankey*

" Costs, together with what is " certified to be due from the " Defendant, <i>Sarah Hammock</i> , " to the several Creditors " named in the first Schedule " to the <i>Master's Report</i> , dated " the 17th July 1786, for their " respective Debts, be paid to " them respectively by the " Defendants <i>John Ruse</i> and " <i>Thomas Jackson</i> , out of the " Sum of 687 <i>l.</i> 13 <i>s.</i> 10 <i>d.</i> , " certified by the said <i>Master</i> " to be the Balance due from " them on account of the value	" of the Stock in Trade, Debts, " Goods and Effects acquired " by the Defendant <i>Sarah</i> " <i>Hammock</i> after the death of " the Testator <i>John Hammock</i> ; " and in case the aforesaid " Sum of 687 <i>l.</i> 13 <i>s.</i> 10 <i>d.</i> shall " be insufficient for payment " of the said Costs and Debts, " it is further ordered, that " such deficiency be paid by " the Defendants <i>John Ruse</i> " and <i>Thomas Jackson</i> out of the " Assets of the said Testator."
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(c) 10 Ves. 110.

v. *Hammock* it was decided that the general Assets were liable.

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Ex parte
RICHARDSON.
and others,
in re
HODSON
and others.

The VICE-CHANCELLOR:—

A Trustee under a Will, carrying on a Trade, pledges the Trust Property given to him for that purpose, and also his own Property; but what is the Trust Property given to him for that purpose, must depend upon the terms of the Will.

In *Ex parte Garland*, the Testator had directed that a specific Sum should be applied for the purpose of the Trade; and that Sum, and no more, was held liable to the Creditors of the Trade.

In *Hankey v. Hammock*, the *Master of the Rolls* thought the Testator had made his general Assets applicable to the purposes of the Trade, and they were therefore directed to be applied in favour of the Creditors of the Trade.

In this Case, all that was meant to be left to carry on the Trade was the Capital in the Trade; and the Executrix was not authorised in employing one Shilling of the Assets beyond the Capital. What the Executrix has employed in the Trade beyond the Capital was in breach of her Trust. The proof must stand.

Petition dismissed.

CASES IN CHANCERY

HAMMOND v. ATTWOOD.

3d February.

*On Demurrer,
held that a Bank-
rupt cannot file
a Bill against a
Debtor to his
Estate on the
ground of the in-
validity of the
Commission,
and of collu-
sion between
his Assignees and
the Debtor ;
the proper course
being, an Action,
to try the vali-
dity of the Com-
mission, or a Pe-
tition to remove
the Assignees.*

IN this Case the Bill was filed by a Bankrupt, to recover property due to his Estate, stating that the Commission against him was invalid, and a combination between his Assignees and the Debtor to the Estate.

The Defendant put in a general Demurrer.

The Case of *Benfield v. Solomons* (a), and Lord *Redesdale's Treatise* (b), were cited in support of the Bill.

The VICE-CHANCELLOR:—

This Bill represents the Commission against the Plaintiff, as not being valid, and that the Assignees betray the Interests of his Estate. If it be true that the Commission is invalid, he should try its validity by an Action, and he cannot by a Bill impeach the Commission. If there be a combination between the Debtor and the Assignees, to prevent the recovery of the Debt, the Bankrupt cannot for that reason collect the Estate, or take upon himself to represent the rights of the Creditors. His proper course is to apply by Petition to have the Assignees removed and new Assignees appointed. In the passage cited from Lord *Redesdale*, a Case is put where the Assignees do not act corruptly, but mistakenly. In such Case the Bankrupt cannot proceed in his own Name by Bill, but should petition for an Order for leave to use the Names of the Assignees, he indemnifying them (c). If such a Bill

(a) 9 Ves. 77.

5 Ves. 583, see p. 587, and

(b) p. 52.

see also what is said in *Ben-*
field v. Solomons, 9 Ves. 84.

(c) Vide *Spragg v. Binkes*,

as this could be sustained, the Bankrupt's affairs would come to be administered in the *Master's Office*. It is not like the Case where Executors collude with a Debtor; there, a Creditor may file a Bill, on behalf of himself and all the other Creditors, for the payment of the Debt. The convenience of the Case requires that he should be permitted to represent those who have the same Interest with himself. But a Bankrupt cannot represent the Creditors under his Commission; they must be represented by Assignees.

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 HAMMOND
v.
ATTWOOD.

Demurrer allowed.

Ex parte FISHER and another, *in re* BARKER.

THE Petition stated, that the Petitioners were Trustees for *G. Barker*, of a Sum of 550*l.* Navy Five per cent. Bank Annuities, which stood in their Names, and that being applied to by *J. G. Barker*, the Bankrupt, who was the Brother of *G. Barker*, for the Loan of 500*l.*, the Petitioners sold out the Bank Stock, and paid the produce, 509*l. 5s. 3d.* to the Bankrupt; and for securing the re-transfer, and payment of the Dividend, the Bankrupt, by Agreement in Writing, dated 22d Oct. 1816, agreed to assign and convey, by way of

11th March.

Bankrupt,
before his Bank-
ruptcy, on a Loan
of Stock, gave a
Bond to re-
transfer the
Principal within
three years, and
pay the amount
of the Dividends
in the mean time,
and also agreed
to convey a real
Estate as a

Security. No re-transfer was made, nor any Dividends paid. Held, that on his Bankruptcy, the Security should be sold, the Dividends paid out of the Produce, and that Stock should be purchased, and if not sufficient to re-purchase the whole Principal Stock, that proof should be made under the separate Estate for the remainder; and that the Assignees were not entitled to have three years to re-transfer the Stock.

1818.

Ex parte
FISHER
and another,
in re
BARKER.

Mortgage, a real Estate to which he was entitled, by way of securing the re-transfer of the Stock, as provided for in a Bond given by the Bankrupt:—That a Bond was executed by the Bankrupt to the Petitioners, dated the 29th June 1816, the condition of which was, that the Bankrupt should pay the amount of what would have been Dividends arising from the Bank Stock, at the time the same would have been payable at the Bank of *England*, without any deduction, and that he should re-invest the Stock within three years from the date of the Bond:—That the Stock had not been re-transferred, nor had any payment been made by way of Interest or Dividends, and that the Principal, with a large arrear of Interest, remained due:—That on the 26th November 1816, a Commission of Bankrupt issued against *J. G. Barker*, under which he was declared a Bankrupt, and Assignees chosen. The *Prayer* of the Petition was, that the real Estate might be ordered to be sold, and that an account might be taken of what was due to the Petitioners, and that the Purchase Money arising from the Sale might be applied in the first place in paying off the Interest or Dividends accruing and due upon the Stock, and then in re-placing, so far as the same would extend, the principal Sum of *550l.* Navy Five per cent. Bank Annuities; and that the Petitioners might prove the amount of so much of the capital Stock as the proceeds of the Sale should be insufficient to replace, and that the Petitioners might be paid, out of the separate Estate of the Bankrupt, a Dividend in respect of such proof.

The Petition was supported by an Affidavit of one of the Petitioners, verifying the facts stated in the Petition.

Mr. Wetherell, for the Petitioners, contended that the option to re-transfer the Stock within three years was done away by the Bankruptcy, all the Bankrupt's Estate being gone.

Mr. Cullen, contra :—

The Assignees stand in the situation of the Bankrupt, and have the same time to replace the Stock which the Bankrupt had.

The VICE-CHANCELLOR :—

If a Bond is given for the payment of a Sum of Money within three years, with Interest in the mean time, and no Interest is paid, whereby the Bond becomes forfeited, the Obligee is, at the Bankruptcy, a legal Creditor for the Penalty, and may prove for the Principal Sum and the Interest then due, as a present Debt. The Prayer of the Petition must therefore be granted. It is not a Case for a rebate of Interest.

STOTT and another v. HOLLINGWORTH and another.

31st March.

WILLIAM CORNFORTH, by his Will, dated 31st October 1801, gave all his personal Estate and Effects, whatsoever and wheresoever, of what nature, kind, or quality soever the same should or might be, (his Watch, Wearing Apparel, Stock of Provison, Liquors, and Coals which should or might be in or about his House at the time of his death only excepted, which he be-

The Tenant for Life of the residue under a Will, has no claim to Interest until one year after the Testator's death.

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queathed to his two Sisters *Dorothy Cornforth* and *Jane Cornforth*); he bequeathed to *John Wastell* and *John Wetherell*, their Executors and Administrators, upon Trust, in the first place to pay all his Debts, Funeral Expences, and also the several Legacies and Annuities by him thereafter given; and he thereby bequeathed certain pecuniary Legacies and Annuities to the several persons therein named, and thereby made payable out of his personal Estate, and subject thereto, he thereby declared that the rest and residue, and remainder of his personal Estate and Effects should be, upon Trust, to pay the net Interest, Dividends, and Profits and Proceeds thereof, to and between his said two Sisters *Dorothy* and *Jane Cornforth*, and the Survivor of them, for and during the term of their respective natural Lives, and the Life of the Survivor of them; and from and after their respective deaths, and the death of the Survivor of them, then the said residue should be, in Trust, for the Testator's Godson *William Cornforth Lowes*, his Executors, Administrators, and Assigns; and the Testator thereby gave and devised to his said Trustees, and the Survivor of them, and the Heirs and Assigns of such Survivor, all such real Estates as should or might at the time of his death be vested in him by way of Mortgage, the better to enable them to call in the Money due upon such Mortgages (if any), and to facilitate and expedite the execution of the Trusts thereby in them reposed; and appointed *Wastell* and *Wetherell* joint Executors of his Will.

The Testator made two Codicils, but by neither of them revoked his Will, and died in 1803.

Wetherell alone proved the Will and Codicils, and alone acted in the execution of the same.

The personal Estate of the Testator (which was much more than sufficient to pay his Debts, Funeral, and Testamentary Expences, and the pecuniary Legacies and Annuities bequeathed by him), consisted chiefly of Money due on Bonds, Mortgages, and other Securities carrying Interest, and of Money in the Funds. So much of the Testator's Property as was not so secured, and carrying Interest (except what had been specifically disposed of by the Testator), was, long before the expiration of one year after the Testator's death, converted into Money by *Wetherell*, and placed out at Interest by him on Securities taken in his own Name.

The Plaintiffs, by their Bill, stating the foregoing facts, insisted that the whole of what accrued due to the Testator's Estate in respect of the Interest of the Monies so secured and carrying Interest until the expiration of one year from the time of the Testator's death, was to be considered as forming part of the Capital of the Testator's residuary personal Estate, and ought to have been secured and placed out in like manner at Interest for the benefit of said *Dorothy* and *Jane Cornforth* during their lives, and after their deaths for the benefit of *William Cornforth Lowes*, as the ultimate residuary Legatee.

The Bill then stated, That *William Cornforth Lowes* died intestate in the life-time of *Dorothy* and *Jane Cornforth*; and Letters of Administration were granted to the Plaintiffs, as two of his next of kin:—That *Wetherell* died in 1813, and appointed the Defendants Executors of his Will, who proved the same:—That *Jane Cornforth* died in the life-time of *Wetherell* and of

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Dorothy Cornforth :—That after *Wetherell's* death, Letters of Administration of the unadministered Personal Estate of the Testator, *William Cornforth*, with his Will annexed, were granted to *Dorothy Cornforth* :—That *Dorothy Cornforth* died in August 1816, and Letters of Administration of the Personal Estate of the Testator, *William Cornforth*, unadministered by *Wetherell* and *Dorothy Cornforth*, with the Will annexed, were granted to the Plaintiffs :—That upon the death of *Dorothy Cornforth*, the Plaintiffs, as the personal Representatives of *William Cornforth* *Loves*, became entitled to have the clear residue of the Testator, *William Cornforth's*, Personal Estate paid to them; and that the same had accordingly been paid, except as afterwards in the Bill stated. The Bill then further stated, That *Wetherell* paid to *Jane* and *Dorothy Cornforth*, as residuary Legatees for life, several Sums of Money, to the amount of 800*l.* and upwards, in respect of the Interest which accrued due upon or for such parts of the Testator's residuary Personal Estate as were placed out on Securities, carrying Interest from the time of the Testator's death, or from the time the same were so placed out on such Securities, within the first year after his death, until the expiration of such first year, although said *Jane* and *Dorothy Cornforth*, as such residuary Legatees for life, were not entitled to receive and be paid the Interest upon or for the Sums of Money so placed out on Securities, carrying Interest from any period of time preceding the expiration of the said year after the Testator's death; such Interest for such first year being and forming part of the Capital of the Testator's residuary Personal Estate, and as such ought to have been placed out by *Wetherell* on Securities at Interest, for the benefit of *William*

Cornforth Lowes, after the death of the Survivor of *Jane and Dorothy Cornforth*; and the Plaintiffs insisted, that as the personal Representatives of *William Cornforth Lowes*, they were entitled to be paid by the Defendant *Hollingworth*, the personal Representative of *Wetherell*, out of *Wetherell's* personal Assets, the amount of what he so paid to *Jane and Dorothy Cornforth*, or permitted or suffered them to receive, in respect of the Interest upon the Testator's residuary Personal Estate, or any part thereof, which accrued or became due within the first year after the Testator's death. The *Prayer* of the Bill was for an Account of what was claimed by the Plaintiffs, and that the Defendants, as the personal Representatives of *Wetherell*, might be decreed to pay what should appear due to the Plaintiff, out of *Wetherell's* personal Assets, with the usual Prayer in case they should not admit Assets.

To this Bill a general Demurrer, for want of Equity, was put in.

Sir *S. Romilly*, and Mr. *Meggison*, in Support of the Demurrer :—

An Annuitant under a Will is entitled to claim the Annuity from the time of the Testator's death; and a Tenant for life of a residue is entitled to be paid Interest, in like manner, from the Testator's death. The Testator could not mean the Tenant for life should starve for the first year after his death. In *Sitwell v. Barnard* (a), and in *Gibson v. Bott* (b), Estates were directed to be converted, which may account for the Tenant for life of the residue not being allowed to claim

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Interest from the Testator's death. In the subsequent Case, of *Fearnes v. Young*(c), Lord *Eldon* says, " It is not very well settled, whether the Tenant for life is entitled to the Interest from the death, or from a year afterwards." It is true, that in general an Executor is not bound to pay Legacies until a year after the Testator's death; but he may do so if the Fund is clear: and supposing this Executor was not bound to pay the Interest for the first year to the Tenants for life, yet doing so, there being a clear Fund, he cannot be called upon to repay such Interest to the residuary Legatee.

The Counsel in support of the Demurrer were stopped by

The VICE-CHANCELLOR:—

A pecuniary Legacy is part of the residue after payment of Debts; and the rule of administration gives to the pecuniary Legatee no Title until the end of the year. It would be strange that the residuary Legatee, who takes the other part of the residue, subject to the pecuniary Legacy, should have a prior title. It is a legal presumption, that until the end of the year the residue cannot be ascertained; and it seems the plainer rule to hold, that what is ascertained at the end of the year to be residue, shall be the Capital, to the Interest of which the Tenant for life of the residue shall be entitled.

(c) 9 Ves. 553.

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STORER v. PRESTAGE.

EDMUND LUCAS, who died in December 1809, by his Will directed his Monies and Effects to be collected by his Trustees, who were to stand possessed of the same, upon Trust, to pay his Debts, Legacies, and Bequests, (except Annuities) and to invest the residue in the purchase of Stock; and out of the Dividends to pay certain Annuities to two of his Daughters and *Ann Fleece*, and to stand possessed of such part of the Stocks as should not be appropriated for the payment of the Annuities; and after the deaths of the Annuitants, of such part of the Stock as was appropriated for the payment of the Annuities, upon Trust, to pay the same unto the Testator's Grandchildren; with a direction, that if the residue was insufficient to purchase Stock producing Dividends to the amount of the Annuities, that the Annuitants should abate.

2d April.
Quære, Where Annuities are given out of a residue, and no time of payment is directed by the Will, do the Annuities commence before the end of one year from the Testator's death? Where the time of payment is fixed by the Will, as in this Case, the first quarter day after the Testator's death, the payment must be as directed.

The Cause now came on for further directions on the Master's Report; and the question was between the Annuitants and the Grandchildren, there being a deficiency of the Fund to pay the arrears of the Annuities, and only sufficient, by the Dividends, to answer the future payments of the Annuities. On the part of the Annuitants it was insisted, the Annuities began to be payable at the first quarter-day after the death of the Testator; and that they were entitled to the Arrears.

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from December 1809. On behalf of the Infants it was insisted, the Annuities were not payable until the residue was ascertained, and that no Arrears could be claimed.

Mr. Trower, and Mr. Wainewright, for the Plaintiffs, the Annuitants :—

Mr. Rose, for the Infant Grandchildren :—

The VICE-CHANCELLOR:—

When Annuities are given out of a residue, and there is no time of payment mentioned in the Will, it may be questioned whether the principle must not be the same as if there were one Tenant for life of the residue, and the Annuities be payable only from the end of one year after the Testator's death. But in this Case, the Annuities are expressly directed to commence at the first quarter-day after the Testator's death; and the Annuitants are therefore entitled to a retrospective account of the Arrears accrued due from that time.

The Decree was:—" Let it be referred back to the said *Master* to tax the subsequent Costs of all Parties, from the foot of his last taxation, as between Solicitor and Client; and out of the Sum of 2,890*l.* 11*s.* 7*d.* Cash, standing in the name of the Accountant General of this Court, on the credit of this Cause, let the said Accountant General be directed to pay such Costs when taxed, &c.: And let the said *Master* enquire and state to the Court whether the residue of the said Cash, after such payment thereout

of the said Costs, will be sufficient to purchase Bank Three-per-cent. Annuities, to answer the full amount of the several Annuities of 50*l.*, 50*l.*, and 20*l.*, given by the said Testator's Will, and also to pay the Arrears which have become due and payable thereon from the 25th day of December 1809: And in case the said *Master* shall find that the said residue is not sufficient for those purposes, let him state what amount of Annuity, in the Three-per-cent. Consolidated Annuities respectively, the said residue will be sufficient to purchase: And for the purpose of calculating the Arrears thereon, let such Annuities be taken at such amount respectively: And let such Arrears, to be computed on such Annuities so severally and for that purpose to be taken as aforesaid, commence and be computed from the time aforesaid, and be paid, in the first place, by the said Accountant General, out of the residue of the said Cash, to the said respective Annuitants; namely, the Plaintiffs, *Harriet Storer*, *Ann Ruddy*, and *Ann Townsend*: And then let the said several Annuities be calculated and adjusted proportionably, according to and out of the remainder of the said Fund, after the payment of such Arrears: And let such remainder be invested in the purchase of like Bank Three-per-cent. Annuities, in Trust in the Cause, to be placed to an Account, to be entitled the Annuitants Account: And let the said Accountant General pay the Dividends which shall from time to time accrue and become payable thereon, to the said *Harriet Storer*, *Ann Ruddy*, and *Ann Townsend*, the Annuitants, during their respective lives, in the proportions which the said *Master* shall so proportionably adjust the same: And after the deaths of the said Annuitants, or either of them, let

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any Person or Persons interested in the said Bank Annuities be at liberty to apply to the Court as they shall be advised."

DAVIS v. DENDY and others.

3d April.

Mortgagee allowed the Expence of a Receiver, the mortgaged Property consisting of small Houses at small Rents, and the Mortgagee living at a distance.

A MORTGAGE of twenty Leasehold Houses in the Parish of St. Andrew's, Holborn, for securing 250*l.* and Interest, was assigned, 28th May 1793, to a Trustee for *Samuel Dendy* (since deceased), who resided at Dorking. In 1798 *Dendy* took possession, but nothing was received by the Assignee of the Mortgage until 1799, and the Interest was not reduced by the receipts until 1809. The Assignee of the Mortgage died in November 1810, and the Defendants were appointed his Executors. The Bill was filed in January 1813, against the Representatives of the Assignee of the Mortgage, for a Redemption and an Account. The *Master*, in taking the Account, allowed 175*l.* 13*s.* 10*d.*, paid by the Assignee of the Mortgage to a person for collecting the Rent of these Houses, being at the rate of one Shilling in the Pound, and also allowed 106*l.* 3*s.* 6*d.* to the Defendants, the Executors of the Assignee of the Mortgage. The *Master's Report* was excepted to, so far as respected his Allowances for the collection of the Rents.

Mr. Lovat, in support of the Exceptions :—

If it had been stipulated in the Mortgage Deed, that the Mortgagee should be at liberty to appoint a Receiver of the Rents of the mortgaged Property, such stipulation would, as determined in *Chambers v. Goldwin* (*a*), have been void. *A fortiori*, the Mortgagee, where there is no stipulation, cannot appoint a Receiver. The Trustee lived in *Chancery Lane*, near the Houses, and might have received the Rents. Since the year 1813, the Executors, who are also residuary Legatees, and entitled to the benefit of the Mortgage, have themselves received the Rents, and cannot, therefore, charge for a Receiver.

Sir S. Romilly, Mr. Bell, and Mr. Sugden, contra :—

In general, a Mortgagee taking possession is not entitled to appoint a Receiver; but if it be necessary, he may. The Houses mortgaged were small wooden Houses, out of repair; the Tenants requiring continual watching, and the Rents obtained with difficulty. The Assignee of the Mortgage lived at *Dorking*, and it could not be expected he would devote himself to the recovery of these Rents. In *Bonithon v. Hockmore* (*b*), the Court said, “Where a Mortgagee or Trustee manage the Estate themselves, there is no allowance to be made them for their care and pains; but if they employ a skilful Bailiff, and give him 20*l.* *per Annum*, that must be allowed; for a man is not bound to be his own Bailiff.”

In *Godfrey v. Watson* (*c*), Lord Hardwicke says, that

(*a*) 9 Ves. 271.

Carew v. Johnston, 2 Scho.

(*b*) 1 Vern. 316.

and Lefr. 301.

(*c*) 3 Atk. 518; and see.

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“ a Mortgagee shall not be allowed for his trouble in receiving the Rents of the Estate himself; but if the Estates lie at such a distance from the place of his residence, as he must have employed a Bailiff if it had been his own, he shall then be allowed such Sums as he has paid to a Bailiff to receive the Rents of the Estate.”

In *Langstaff v. Fenwick* (*d*), the *Master of the Rolls* would not allow a charge for a Receiver, where the Mortgagee had received the Rents himself; and says, “ Nothing is considered as Evidence that the appointment of a Receiver was necessary, but that appointment itself; and the Court takes the circumstance, that a Receiver was not appointed, as Evidence that a Receiver was not necessary.”

The VICE-CHANCELLOR:—

This is a Case of general importance. A Mortgagee cannot be paid as a Receiver, nor can he, generally and universally, when he takes possession, appoint a Receiver. But if the nature of the Estate be such, that great time and trouble must be sacrificed in the receipt of the Rents, he may appoint a Receiver.

Here the Mortgagee resided at *Dorking*, and the mortgaged Property was of such a description, that a provident Owner of the Estate, whose time was of value to him, would probably have thought it right to appoint a Receiver. The Trustee's residence is immaterial. He was not the Person beneficially entitled,

nor the Person to receive the Rents. The charge, therefore, in respect of a Receiver during the life of the Assignee of the Mortgage, must be allowed.

The Testator died in 1810, and appointed the Defendants Executors and residuary Legatees. The latter circumstance I lay out of the question. After the death of the Assignee of the Mortgage, the Executors received the Rents up to the year 1813, and then appointed a Receiver. As the Assignee of the Mortgage could not have charged for a Receiver if he had himself received the Rents, so his Executors, as long as they received the Rents, can make no charge for a Receiver; but they may charge from the time when they appointed a Receiver. Let the Deposit be divided.

One Exception overruled, and the other in part allowed.

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Bill filed by GEORGE RYAN and HANS RANDOLPH SWABYE, on behalf of themselves and all other the Joint Creditors of JOHN ANDERSON, deceased, and ALEXANDER ANDERSON;

Against

The said ALEXANDER ANDERSON, and EDWARD STEWART and THOMAS CURBANE, his Assignees, he having become Bankrupt, and JOB MATTHEW RAIKES and ALEXANDER WILSON, the Executors of JOHN ANDERSON.

9th April.

*On a Bill by
Assignor and
Assignee of a
Debt, for the
recovery of the
same, stating the
Assignment, it is
not necessary to
prove the Assignment,
though the
Defendants state
they are ignorant
of it.*

THE Bill stated, that the Plaintiff *Swabye* was surviving Executor of *John Leonard Fir*, of Copenhagen, who was a Creditor of *John Anderson* and *Alexander Anderson*, who were Merchants and Copartners; and that the Executors of *Fir*, after his death, appointed *John Anderson* and *Alexander Anderson* to procure Administration to *Fir* in *England*; and that in respect of these matters, there was due from the *Andersons* to *Swabye*, as surviving Executor of *Fir*, a Sum of 5,797*l. 2s. 4d.*; and that this Debt had, according to the usage in *Denmark*, been sold by auction, and the Plaintiff *Ryan* had become the Purchaser of it; and that Plaintiff *Swabye* had executed the proper Assignment, so as by the laws of *Denmark* to vest the debt in him; and the Bill prayed that the Joint Estate of the two *Andersons* might be first applied in payment of the 5,797*l. 2s. 4d.*, and Interest, and the other Joint Debts; and that the deficiency of the Joint Estate

might be supplied out of the separate Estate of *John Anderson*, after payment of his separate Debts.

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RYAN
and others,
v.
ANDERSON
and others.

The Defendants, by their Answers, admitted the Sum of *5,797 l. 2 s. 4 d.* to be due from the *Andersons* to the Plaintiff *Swabye*, as surviving Executor of *Fix*, but made a question as to Interest on that Sum ; and they stated themselves to be wholly ignorant of the alledged Sale and Assignment by *Swabye* to the Co-plaintiff *Ryan*.

At the hearing, Sir *Samuel Romilly*, Counsel for the Defendants, objected that there could be no Decree for the Plaintiff *Ryan*, because his Title, as Assignee of the Plaintiff *Swabye*, was not admitted by the Defendant, nor proved in the Cause.

The VICE-CHANCELLOR :—

The Assignment by *Swabye* to *Ryan*, being matter wholly immaterial to the Defendants, is not in issue in the Cause, and could not be the subject of proof. The Assignment from *Swabye* to *Ryan* is matter between the two Plaintiffs ; and the statement of the fact in the Bill, to which they are both Parties, is an admission of the fact by *Swabye* on which the Court is bound to act. The Defendant admits the Title of *Swabye*, and *Swabye* admits that he has transferred that Title to *Ryan*; and *Ryan* is therefore entitled to a Decree against the Defendant.

1818.

21st April.

A Trustee is entitled to his Costs, unless he acts from motives of obstinacy and caprice.

TAYLOR and Ux. and others, v. GLANVILLE.

THOMAS CLARKE, who died in 1800, by his Will, 2d December 1800, gave to *Phillip Wright* the Sum of 100*l.*, upon Trust, for the separate use of the Plaintiff *Melony Taylor* and her Children, i. e. the Interest arising out of the same to be paid to *Melony Taylor* yearly during her life, and after her death the Principal to be divided among her Children; but if Plaintiff *M. Taylor* should have occasion for her better support, she should be at liberty to draw for any part of said 100*l.* as wanted; and he gave the residue of his property amongst certain persons, including the Plaintiff *M. Taylor*, but her Share to be for her separate use. *Phillip Wright* afterwards died, and the Defendant was appointed Executor of his Will, and proved the same.

At the Testator's death, *Melony Taylor* had four Children, the Plaintiffs *Elizabeth, Sarah, and Mary*, and a Son, *John Taylor*. The Son died, and Letters of Administration were granted to the Plaintiff, *Joseph Taylor*. The Daughters having attained twenty-one, expressed their desire of relinquishing their Reversionary Interest in favour of their Mother; and in March 1813 application was made to *Flood*, the Attorney of the Defendant, for the payment to *Melony Taylor* of the Legacy of 100*l.* and the fourth part of the residue of the Testator's Effects. In January 1815, a similar application was

made. On the 3d Jan. 1815, the Solicitors of the Plaintiffs wrote to the Defendant, requesting payment of the 100*l.* Legacy, and the Share of the Residue, all Parties being ready to give the necessary Releases; which Letter not being answered, another Letter was written by such Solicitors, on the 27th January following, and stating that, if a satisfactory answer was not given, a Bill would be filed against the Defendant. At the beginning of February 1815, the Solicitors received an answer from the Defendant, saying the business should be completed as desired; but afterwards he refused to pay the Money, being advised that he could not safely pay the same without the direction of the Court.

A Bill was thereupon filed against the Defendant for payment of the Legacy, and *M. Taylor's* Share of the Residue, and for an Account, but an Account was afterwards waived.

The Plaintiff *Melony Taylor* had been paid the Interest on the Legacy, and on the Residue, up to the filing of the Bill.

The single question was, who should pay the Costs of the Suit?

Sir *S. Romilly*, and Mr. *Moore*, for the Plaintiffs:—

The Defendant ought to pay the Costs of the Suit. He might have paid the Legacy and the Share of the Residue to the Plaintiff *Melony Taylor*, without any danger, releases being tendered by all necessary Parties.

Mr. *Hart*, and Mr. *Mascall*, for the Defendant:—

The Defendant thought he was not justified in paying

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and Ux. and
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the Legacy and the Share of the Residue, as the Husband of *Melony Taylor* would then have it, contrary to the intention of the Testator, who intended it for the separate use of *Melony Taylor*. Her consent to the payment of the Money was a nullity, she being a Feme Covert. The Defendant was right in requiring the sanction of the Court for the payment, and ought to have his Costs.

The VICE-CHANCELLOR:—

The Bill prays an Account, but that part of the Prayer is abandoned. It is a Bill by *Cestuis que Trust* against the Trustee, to have certain Trust Monies paid to them, and upon this the question of Costs arises. The Sum is small, but whether large or small the same principle must be applied.

Trustees are entitled to the protection and direction of the Court in the exercise of their Trusts, and can never be called upon to pay Costs, unless they refuse to act without suit merely from obstinacy and caprice. It would be against the interests of society to hold otherwise.

Evidence is admissible to show that they have acted from obstinacy and caprice, but the circumstances of this Case do not afford such evidence. Though it be true, that the Defendant might safely have paid the Annuity and the Share of the Residue, yet in refusing to do so, unless under the direction of the Court, there might be neither obstinacy nor caprice. The Defendant, a Trustee for this married Woman, might very honestly think it wrong to pay this Money, which

would go to her Husband, without the sanction of the Court. The Defendant must have his Costs out of the Fund.

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TAYLOR
and Ux. and
others,
v.
GLANVILLE.

CROW and others, v. TYRRELL.

THIS Case, on the Argument of the Plea, and liberty given to amend the Bill, &c. is reported *ante 2 vol. p. 397.*

22d April.

An Heir at Law, out of possession, cannot file a Bill for possession of the Estate and the Title Deeds, &c.

The Plaintiff accordingly amended his Bill, which before was a Bill of Discovery, and rendered it a Bill for Relief. The Amendments in the body of the Bill consisted of a statement that the Defendant and his Ancestors, within twenty years, had frequently acknowledged the Plaintiff's Title, and within that period their right had been attempted to be obtained, and there was the following addition to the *Prayer* of the Bill: "And that the said Sir John Tyrrell may be decreed forthwith to deliver possession of the said real Estates to the Plaintiff, and also all Title Deeds, Evidences, and Writings in his possession or power relative thereto; and also to account for and pay to the Plaintiffs, according to their respective Rights and Interest, so much of the Rents and Profits of the said real Estates as they shall, under the circumstances aforesaid, appear now entitled to," &c.

To this Bill, a *General Demurrer* was put in.

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and others,
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TYRELL.

Mr. Hart, and Mr. Willis, in Support of the Bill:—

In *Dormer v. Fortescue* (a) relief was given on a Bill of this description, though there had been no Trial at Law. The Bill states an admission of the Plaintiff's Title within twenty years, which forms a ground for relief. *Hodle v. Healey* (b).

Sir S. Romilly, and Mr. Garratt, contra:—

The Plaintiffs state their Title as Heirs at Law, but do not state that the Deeds are necessary to establish their right, nor any obstacle to proceedings at Law. In *Dormer v. Fortescue* the Bill stated, there were outstanding Terms, and Lord Hardwicke relies on that circumstance (c). There is no Case where a person stating himself to be Heir at Law, and out of possession, has been held entitled to come here for Title Deeds. Lord Redesdale says, “If the Title to the possession of Deeds and Writings of which the Plaintiff prays possession, depends on the validity of his Title to the property to which they relate, and he is not in possession of that property, and the evidence of his Title to it is in his own power, or does not depend on the production of the Deeds or Writings of which he prays the delivery, he must establish his Title to the property at Law, before he can come into a Court of Equity for delivery of the Deeds or Writings (d).” That is exactly this Case. In *Pulteney v. Warren* (e), Lord Eldon says, “I do not know a Case in which the Heir has claimed, merely as Heir, an Account, not stating, any impediment

(a) 2 Atk. p. 282 and 3 Atk. (d) Lord Redesd. Tr. Plead.

124.

43. edn. 3.

(b) 1 Ves. and Bea. 537.

(e) 6 Ves. 89.

(c) 2 Atk. 281; 3 Atk. 132.

to his recovering at Law ; as that the Defendant has the Title Deeds necessary to maintain his Title ; or that Terms are in the way of his recovery at Law, or other legal impediments which do, or which may, probably, prevent it ; upon which probability, or upon the fact, the Court founders its Jurisdiction." In *Pemberton v. Pemberton* (*f*), the same doctrine is enforced. In *Armitage v. Wadsworth* (*g*) there was an Ejectment Bill, stating outstanding Terms ; the Defendant pleaded there were no outstanding Terms, and that Plea was allowed, on the ground that, there being no obstacle to the Plaintiff's proceedings at Law, there was no ground for a Bill in Equity.

If the Cause were brought to an hearing, the Court would not say the Deeds should be separated from the possession, until the right was determined at Law ; why not, therefore, try the right in the first instance ? If such a Bill as this were allowed, Bills would always be filed previous to an Ejectment. The Plaintiff comes here for equitable relief after twenty years, but the Court will not relieve after such a lapse of time, even though there has been *fraud*. *Bonney v. Ridgard* (*h*), *Beckford v. Wade* (*i*). The Court has made a sort of Statute of Limitations for itself.

The VICE-CHANCELLOR :—

An Heir out of possession is entitled to a discovery of Deeds necessary to support his legal Title, or to have Terms put out of his way which may impede his recovery at Law ; but this Bill, although the Plaintiff is

(*f*) 13 Ves. 297.

Ves. 98, and approved by the

(*g*) 1 Madd. Rep. 189.

late Master of the Rolls.

(*h*) 1 Cox, p. 145, cited

(*i*) 17 Ves. 37.

4 Bro. C. C. 138, stated also 17

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an Heir out of possession, does not pray the aid of this Court in order that he may assert his legal Title, but prays immediate relief, by the delivery of the possession of the Estate and of the Title Deeds. It is not denied, that if this Bill had prayed the delivery of the possession of the Estate only, that the Demurrer would hold; because this Court cannot relieve upon a legal Title. But it is said that the delivery of Title Deeds is equitable relief; and that this Court, having in that respect jurisdiction, will do complete justice. The possession of the Title Deeds is incidental to the possession of the Estate, but cannot be recovered with the Estate at Law. This Court, therefore, will give the Title Deeds to him who has at Law recovered the possession of the Estate; but its jurisdiction in this respect is confined to the Possessor of the Estate. If this Plaintiff recovers the Estate at Law, then, and not till then, he may come here for the possession of the Title Deeds. All the Cases prove this.

Demurrer allowed.

1818.

LOPES v. DE TASTET.

IN this Case a Plea had been set down, but when it came on to be heard, the Plaintiff declined arguing it, stating his intention to amend the Bill.

22d April.

The VICE-CHANCELLOR:—

As the Plaintiff, by desiring to amend the Bill, admits the validity of the Plea, the Plea must be allowed, on payment of the usual Costs of 5*l.* The Plaintiff is at liberty to amend.

His *Honor* also observed, on the suggestion of Mr. *Bell*, that the usual words in the Order, “*upon hearing and debate, &c.*” must not, in this Case, be inserted.

NOEL v. KING.

THE previous proceedings in this Case are reported *ante* vol. 2. p. 392.

24th April.

After a motion for a month's time after Cross Bill answered, to answer Original Bill, and the Cross Bill is answered, and a month expired, a Motion cannot be made, as of course, for further time to answer the Original Bill.

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Mr. Wakefield now moved, as a motion of course, for three weeks further time to answer the Original Bill.

The VICE-CHANCELLOR:—

The application for a month's time to answer after the Cross Bill should be answered, amounted to a pledge, on the part of the Defendant, that he would answer within the month. He is not entitled, as of course, to any further Order for time.

Motion refused.

GARDNER v. PARKER and others.

28th April.

Gift of a Bond by delivering the same, and saying, "There, take that and keep it," in the last sickness of the Donor, he dying two days after, held to be a Donatio causa mortis, and Donee directed to be at liberty to use the Executors Names in suing on the Bond, he indemnifying them; and the Costs of the Suit to be paid out of the Testator's Estate.

RICHARD CROSSLEY being on terms of intimacy with the Plaintiff (who had rendered the deceased various services), and being seriously ill, and confined to his bed, two days before his death, in the presence of a Servant, gave the Plaintiff a Bond for 1,800*l.*, saying, at the same time, "*There, take that and keep it.*" The Defendants were the Executors of *Crossley*, and the Prayer of the Bill was, that the Plaintiff might be declared entitled to the Bond; and that the Defendants might be decreed to execute proper Instruments to enable the Plaintiff to recover and receive the Money due on the Bond; and that the Plaintiff might be at liberty to make use of the Names of the Defendants in any Action to be brought against the Obligors, the Plaintiff offering to indemnify the Defendants against all Costs.

Sir *Samuel Romilly*, and Mr. *Rouppell*, for the Plaintiff:—

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Mr. Cooke, contra:—

This cannot be considered as a Gift or a *Donatio causā mortis*. It was not given in contemplation of immediate death. *Bunn v. Markham*(a). No Property could pass by the delivery of the Bond, it being a *Chose in Action*.

The VICE-CHANCELLOR:—

The Case of *Snelgrove v. Bailey*(b) has established, that there may be a *Donatio mortis causā* of a Bond, though not of a simple contract Debt, nor by the delivery of a mere symbol. The doubt here is, that the Donor has not expressed that the Bond was to be returned if he recovered. This Bond was given in the extremity of sickness, and in contemplation of death; and it is to be inferred, that it was the intention of the Donor that it should be held as a Gift only in case of his death. If a Gift is made in expectation of death, there is an implied condition that it is to be held only in the event of death. The Cases of *Lawson v. Lawson* (c), *Miller v. Miller* (d), and *Jones v. Selby* (e), furnish this rule. Let it be declared that the Plaintiff is entitled to this Bond as a *Donatio mortis causā*; and that, indemnifying the Executors, he is at liberty to sue in their Names; and let the Costs be paid out of the Testator's Estate.

(a) 2 Marshall, 532.

(d) 3 P. Wms. 358.

(b) 3 Atk. 214.

(e) Prec. Ch. 300.

(c) 1 P. Wms. 441.

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R. P. being entitled to two Copyholds, surrendered one to the use of his Will, and bequeathed both Copyholds to his Trustees and Executors, in Trust, for his Grandson. The Trustees and Executors renounced Probate, and were not admitted. The Son of R. P. was afterwards admitted to the Copyholds, and he surrendered, for a valuable consideration, to one Holloway, who surrendered to the Father of the Plaintiff, by whom the Copyholds were bequeathed to the Plaintiff. Held, as to the Copyhold which R. P. surrendered to the use of his Will, that the Plaintiff, his Grandson, was entitled, though thirteen years had elapsed from the time he became adult, and that the Defendant was a Trustee for, and must surrender to, him: and an Account was directed of Timber cut; and also of the Rents and Profits for the last six years.

PEARCE v. NEWLYN.

RICHARD PEARCE, the Plaintiff's Grandfather, being entitled to several Copyholds, called *Tanners Parrock*, and *Greenhill Lands*, by his Will, 20th Sept. 1777, bequeathed the same to his Trustees and Executors, to receive the Profits, and apply them to the maintenance of his Grandson, the Plaintiff, until he attained twenty-five, and then to surrender the Copyholds to him. *Richard Pearce* died 30th March 1779, leaving *Richard Pearce* his eldest Son and Heir, according to the custom of the Manor, and leaving the Plaintiff, his Grandson, an Infant. The Trustees renounced Probate, and died without having been admitted. On the 6th Jan. 1784, *Richard Pearce*, the Son of the Testator, was admitted Tenant of the Copyholds, and died in 1803, leaving the Plaintiff his eldest and only Son and Heir, and customary Heir, who attained twenty-five in Jan. 1800. *Richard Pearce*, the Father of the Plaintiff, soon after his admittance to the Copyholds, surrendered the same to one *Richard Holloway*, his Attorney, and he was admitted to the same; and *Holloway* in 1796 surrendered the same to *Thomas Newlyn*, who surrendered the same to the use of his Will, and bequeathed them to the Defendant, whom he made his Executor. On the 19th October 1801, the Plaintiff, as Grandson and Devisee of *Richard Pearce* the Grandfather, procured him-

self to be admitted to the Copyholds; but the Defendant continued in possession of them, and cut down great quantities of Timber. The *Prayer* of the Bill was, that the Defendant might be declared a Trustee of the Copyhold Lands for the Plaintiff, and might be directed to surrender the same to him; and that an Account might be taken of the Rents received by him, and of the Timber cut by the Defendant's Father, or by the Defendant, and to pay to him what should be found due.

The Defendant, by his Answer, stated, that *Richard Pearce*, the Grandfather, did not surrender all the Copyholds, but only *Greenhill Lands*, to the use of his Will; and *Richard Pearce*, the Father, was therefore entitled to enter as customary Heir, and that he was entitled to dispose of the same:—That in the admittance of *Richard Pearce*, the Father, to the Copyhold called *Greenhill Lands*, the non-appearance of the Devisees in Trust under the Will of *Richard Pearce* the Grandfather, is mentioned in the Court Roll of the Manor, but no such fact was stated in the admittances to the other Copyholds. He then insisted on his Title, as derived under a Purchaser for a valuable Consideration without Notice.

Sir *Samuel Romilly*, and Mr. *Merivale*, for the Plaintiff:—

The Defence, that the Defendant claims under a Purchaser for a valuable Consideration, cannot be sustained; for in the admittance of *Pearce*, the Father, to the Copyhold, the Will of *Pearce*, the Grandfather, is noticed, and that the Devisees under his Will had not applied to be admitted. *Holloway* and *Newlyn* must be taken to have had notice of that, since it

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appears on the Court Rolls. The obtaining a new Grant by the Lord, to *Pearce* the Father, was a Fraud.

Mr. Hart, and Mr. Wingfield, for the Defendant:—

A Purchaser of a Copyhold is not bound to search the Court Rolls. If he does search them, what appears on them is Notice, but not otherwise (a). The Defendant, as claiming under a Purchaser for a valuable Consideration, without Notice, cannot have his Purchase impeached. Another objection is, that after such a length of time, the right of the Defendant cannot be affected.

The VICE-CHANCELLOR:—

The Case is narrowed to the *Greenhill Land*; and the question is, Whether, under the circumstances, the Defendant *Newlyn* is to be considered, as to that Land, a Trustee for the Plaintiff?

It appears by the Court Roll, that this Land was devised by the Grandfather to Trustees; that the Trustees did not apply to be admitted; that *Pearce* the Father declined to be admitted as Heir to the Grandfather; and that a Forfeiture being incurred, he took a new Grant to himself. This was a plain Fraud; and he became, upon his admission, a Trustee for the uses of the Grandfather's Will. The Court Rolls are the Title Deeds of Copyholds; and a Purchaser is affected with Notice of the contents of the Court Rolls, as far back as a search is necessary for the security of the Title. When *Holloway* purchased of *Pearce* the Son,

(a) In *Hansard v. Hardy*, 18 Ves. 462, the late *Master of the Rolls* seems to have doubted whether a person purchasing a

Copyhold Estate, must be presumed to have Notice of every thing on the Court Rolls relative to it.

and when *Newlyn* purchased of *Holloway*, he would, with reasonable diligence, have learnt, and therefore must be presumed to have learnt, from the inspection of the Court Rolls, those circumstances which made *Pearce* the Son a Trustee for the uses of the Grand-father's Will. He who purchases of a Trustee, with Notice of a Trust, becomes himself a Trustee.

An objection is made to the relief prayed, on the ground of lapse of time. If twenty years had passed, I should have thought the objection material; but here only thirteen years have elapsed. The Plaintiff came of age in 1800, and the Bill was filed in 1813. The Defendant must be declared to be a Trustee of the Copyhold called *Greenhill Lands*, to the uses of the Grandfather's Will, and must surrender to the Plaintiff, and account for the Timber cut, if it belongs to the Tenant and not to the Lord, and must account for the Rents and Profits for six years past; but I shall not give Costs, on account of the delay in the institution of the Suit.

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END OF PART I.



CASES

BEFORE THE

VICE-CHANCELLOR.

GRIFFITHS v. ROBINS. (a)

The VICE-CHANCELLOR'S JUDGMENT.

1818.

9th April.

THIS Cause comes on upon a Supplemental Bill, by *Deed of Gift* *W. Griffiths*, as the Devisee and Executor of *Mary* ordered to be delivered up, as obtained by undue influence over the Donor, who was eighty-four years old, and nearly blind, and placed a confidence in the Donee. It is said, that the present Plaintiff, *Griffiths*, applies under the effect of a similar influence, which he imputes to the Defendant in the Cause; but, upon the state of this record, I am to consider this Cause as if *Mary Morris* herself was now the Plaintiff before me.

It appears, that *Mary Morris* was upwards of eighty-

(a) Ex Relatione.

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four years of age ; and at the period in question, blind, or nearly so, and altogether dependent on the kindness and assistance of others. *Thomas Griffiths* had married the Niece of *Mary Morris*. She had entire trust and confidence in them ; and it may be stated that they were the Persons upon whose kindness and assistance she depended. They stood, therefore, in a relation to her, which so much exposed her to their influence that they can maintain no Deed of Gift from her unless they can establish, that it was the result of her own free will, and effected by the intervention of some indifferent person.

It appears that *Mary Morris*, being possessed of a very narrow income—a freehold house and premises of the value only of about 20*l.* per annum, and a few household goods—executed a Deed of Gift of all her real and personal Property to *Griffiths* and his Wife, only reserving a Life Interest, and depriving herself of the power of applying any part of the Principal of her small Property for her maintenance during her Life.

It is a suspicious circumstance, that there is a recital contained in the Deed, of a fresh Lease to *Griffiths*, and that no such Lease appears to have been executed.

I do not think it necessary, however, to enter into all the transactions stated to be attendant on the Deed, and the manner in which it was prepared. It is sufficient to say, that the Defendants have not made out that Case which the policy of this Court requires from Persons standing in that relation to the Donor in which they had placed themselves.

The Decree must therefore be according to the Prayer of the Bill, except as to the Lease to *Griffiths*, which does not appear to exist.

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ROBINS.

Mr. Bell, and *Mr. Roots*, for the Plaintiffs:—

Mr. Hart, and *Mr. Girtlestone*, for the Defendants,
Robins and *Irons*:—

Mr. Collinson, for Defendant, *Thomas Griffiths*, the Infant.

FILDES v. HOOKER.

THIS Cause, in the preceding stage, is reported by *Mr. Merivale* (a).

It having been referred back to the *Master* to review his Report; the *Master*, by his reviewed Report, stated, that objections having been made before him, on the part of the Defendant, that the Premises were by former Leases made subject to Covenants for Rents, and otherwise, to which it is alleged the Premises still remain liable; he was of opinion, that upon the Plaintiff indemnifying the Defendant against the performance of any Covenants which may have been entered into by the Plaintiff, or any former Lessees of the Premises, for payment of any Rents, or otherwise, in respect of the Premises, the Plaintiff can make a good Title to

3d April.

Held, that a Lessee, subject to Covenants, cannot compel a specific performance of an Agreement to purchase the Premises, though he offered to indemnify the Purchaser against the performance of the Covenants.

(a) 2 Meriv. 424.

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the Premises upon a Lease for the term of twenty-one years, according to the Agreement.

This Report was excepted to.

Mr. Sugden, in support of the Exceptions :—

Mr. Roupell, and Mr. Preston, contra :—

The VICE-CHANCELLOR :—

The Plaintiff comes to this Court to compel the specific performance of a Contract, by which the Defendant engages to accept from him a Lease of the Premises in question for twenty-one years. He can have no title to the assistance of the Court unless he is able to perform the Agreement on his part—unless he is able to give to the Defendant a secure Lease for the term of twenty-one years. It appears that the House in question is one of the six Houses built on ground demised by the *Skinner's Company* to Mr. Burton, for a term of 99 years from Michaelmas 1807, at a ground-rent of 10*l.*; and in that Lease is contained a proviso for re-entry upon non-performance of any of the Covenants contained in it.

The Plaintiff is now in possession by an assignment of an Under-Lease, granted by Mr. Burton, of this particular House. This Under-Lease contains all the Covenants which are included in the original Lease; but it is obvious that the observance of these Covenants by the Holder of this Under-Lease cannot alone protect his possession.

If this Defendant were to accept the Lease contracted for from the Plaintiff, and the Covenants in the original

Lease, though well observed with respect to this particular House, were to be broken as to any other of the five Houses, the *Skinner's Company* would be entitled to re-enter, not only upon that particular House, but upon the whole property comprised in the original Lease, and, consequently, upon the Premises in question.

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The Plaintiff is necessarily, therefore, driven to admit that he cannot give to the Defendant a secure Lease for the Term of his Contract, but the *Master* has considered that the offer of the Plaintiff to indemnify the Defendant in case of his eviction, is equivalent to a secure title. I cannot bring myself to that opinion. Where a good Title can be made, subject to a pecuniary charge, a Court of Equity has compelled a specific performance of the Contract upon security against the charge. Even that principle might have been questionable, as imposing, at all events, a considerable degree of trouble upon a Purchaser, to which he had not subjected himself by the terms of his Contract. But there, the Purchaser is effectually protected in the possession of the specific subject of his Contract. Here, the Plaintiff admits that he cannot protect the Defendant in the specific subject of his Contract; and only proposes, in effect, to secure to him a pecuniary compensation for the value, in case he loses that possession. A Court of Equity has never acted upon such a principle. A Vendor cannot be aided here who is not able to secure to the Purchaser the specific Property for which he has contracted.

Exceptions allowed..

1818.

24th April.

25th May.

Order to dismiss a Bill obtained, but not served till eight months after. Between the Order and the service of it, the Plaintiff obtained an Order to amend. Held, that the Order to amend was regular.

AN Order had been obtained in this Cause, on the 16th of April 1817, to dismiss the Bill, but the Order was not served until the ensuing December. Between the obtaining, and the service of the Order, the Plaintiff, in ignorance of the same, obtained an Order to amend. A Motion was now made to discharge the latter Order.

Mr. Wingfield, in support of the Motion :—

Mr. Bell, contra :—

The Vice-Chancellor, after taking time to inquire into the practice, refused the Motion, stating, that the Plaintiff was regular in his amendment, having had no notice of the *ex parte* order to dismiss the Bill.

Motion refused.

1818.

EDWARDS v. EDWARDS.

29th April.
27th May.

LEWIS EDWARDS, in a voluntary Settlement, by Lease and Release, 19th and 20th July 1783, conveyed certain Lands to a Trustee, to hold the same to the use of the said *Lewis Edwards* for Life, with Remainder to Trustees, &c., Remainder to the first Son by the Plaintiff (his Wife) in Tail, Remainder to the second and every other Son in Tail, Remainder to the Daughters, with cross Remainders between them, *with Remainder to the right Heirs of the Settlor*; and the Deed contained a proviso, "that it should and might be lawful to and for the said *L. Edwards*, from time to time, during his natural Life, by any Deed or Writing, Deeds or Writings, to be signed, sealed, and delivered by him the said *Lewis Edwards*, in the presence of, and attested by, two or more credible Witnesses, to revoke or make void all and every, or any, the use or uses, Estate or Estates, thereinbefore limited and declared, or expressed of and concerning the said Farm Lands, Hereditaments, and Premises thereby released and conveyed, or expressed or intended so to be; and by the same or any other Deed or Deeds, Writing or Writings, to be signed, sealed, and executed as aforesaid, to limit and appoint, or declare, any new or other use or uses, Estate or Estates, of and in the same Farms, Lands, Tenements, Hereditaments, and Premises, or any part or parcel thereof, to any Person or Persons whomsoever; or to limit and appoint the same, or any part thereof, to or for

Query, Whether on a Power given to L. E. to revoke Uses "from time to time during his natural Life," such Revocation and Re-appointment "to be signed, sealed, and delivered in the presence of and attested by two or more credible Witnesses," can be executed by Will?

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such other use or uses, intents and purposes, and in such manner and form as he the said *Lewis Edwards* should think fit, any thing thereinbefore contained to the contrary thereof in anywise notwithstanding." At the time the Deed was executed *Lewis Edwards* was married, and without Issue, but he afterwards had Issue, by the Plaintiff his Wife, *Lewis Edwards* the Defendant, their eldest Son, and three Daughters (three of the Co-plaintiffs).

Lewis Edwards, the Son, married in the Life-time of his Father, and the Father executed a Conveyance by way of Settlement, by which he conveyed certain Lands, which were the most valuable part of the Lands comprised in the preceding Settlement, in Trust, for the said *Lewis Edwards* the Son, and his Issue.

Lewis Edwards the Father, being afterwards desirous of revoking the last-mentioned Settlement on his Son, by virtue of the Power of Revocation contained in the Settlement of 1783, and to make a new appointment in favour of his Wife and younger Children (the Plaintiffs), and to make an adequate provision for them by means thereof and with certain other Lands belonging to him, after his death, and intending thereby duly to execute the Power of Revocation and Appointment, reserved by the Settlement of 1783; he, by his Will, 27th September, duly executed and attested, as required in the case of devises of Real Estates, gave and devised the Lands settled by the Deed of 1783, together with other Lands, unto the Plaintiff his Wife, for her life, and after her decease, to the Plaintiff *Thomas Edwards*, his second Son, his Heirs and Assigns for ever, subject to the payment of 500*l.* to his third Son, the Plaintiff *William Edwards*;

and also to the payment of 300*l.* to each of his Daughters, the Plaintiffs *Margaret* and *Ann Edwards*; and all the rest of his Estate, both real and personal, he gave to his Wife, the Plaintiff *Elizabeth Edwards*, and appointed her his sole Executrix and Residuary Legatee.

Lewis Edwards the Father died in October 1815, leaving the Defendant *Lewis Edwards*, his eldest Son, surviving.

Upon the death of *Lewis Edwards* the Father, the Plaintiff *Elizabeth Edwards*, his Widow, entered into Possession and receipt of the Rents and Profits of the devised Lands, and hath ever since continued in such Possession.

The Plaintiffs, by their Bill, stating the foregoing facts, insisted that the Will was at Law a good Revocation of the Settlement made on the Son; and if not, that it was a good Revocation and Appointment in Equity; and that, under the circumstances, a Court of Equity would supply, in favour of the Plaintiffs, any legal defect in the execution thereof; and *prayed*, that the Will might be declared a good execution of the Power in Equity; and that the Defendant might be decreed to make and execute all proper Assurances for supplying such defect, if any, in the execution of the Power at Law, and settling the Premises according to the Trusts of the Will; and that the Defendant might be restrained, by Injunction, from all further proceedings in an Action commenced at Law, against the Plaintiff *Elizabeth Edwards*, for the recovery of the settled

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Premises, and from bringing any other Action against the Plaintiffs.

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To this Bill the Defendant put in a *General Demurrer.*

Mr. Blake, in Support of the Demurrer:—

The Power, though to be revoked, according to the terms of it, by Deed, might, according to decided Cases, be revoked by Will. *Kibbet v. Lee (a), Countess of Roscommon v. Fowke (b).*

If the Power is well executed at Law, the Plaintiff has no right to come here.

Sir Samuel Romilly, and Mr. Horne, contra:—

At Law this would not be a good execution of the Power, for a Will only takes effect by the death of the party. The authorities quoted have been questioned. In *Kibbet v. Lee*, the Revocation was to be by a Writing attested by three Witnesses, which might therefore be supposed to include a Will, but here the Revocation is to be by a Deed or Writing attested by two Witnesses: but a Will attested only by two Witnesses would be invalid; it is clear, therefore, that the Power was not meant to be executed by Will. If this be, as it is, a bad execution of the Power at Law, it is a Case for relief in Equity, the Plaintiffs being, as a Wife and Children, entitled to have the defect in the execution of the Power supplied.

Mr. Blake, in Reply:—

In those Cases where a Surrender has been supplied, it is where the Party intending to execute the Power

was Owner of the Estate; but here the Estate was vested in the first Son, subject to be divested by a due execution of the Power. In *M'Adam v. Logan* (c), it was determined, that between two Sons the Court will not supply the defective execution of a Power; and in *Montague v. Bath* (d), Lord Chief Justice Holt was of the same opinion.

In this Case it is also observable, that *Lewis Edwards* the Father had a Reversion in Fee; and though his Will were not a good execution of his Power, the Will might still operate upon his Interest, as Remainderman in Fee.

The VICE-CHANCELLOR:—

Upon looking into the language of the Deed in this 27th May. Case, creating the Power, there is certainly ground to contend that the Power of Revocation and new Appointment was only to be exercised by *Deed*. The Power is given to *L. Edwards*, “from time to time, during his natural life,” to revoke the uses and re-appoint: which affords an inference that a Deed was intended, and not a Will, which only operates from the death. The Power of Revocation and Re-appointment is “to be signed, sealed, and delivered in the presence of, and attested by, two or more credible Witnesses,” but a Will is not sealed or delivered, and two Witnesses to a Will would not have been sufficient. There are, however, some strong Cases to the contrary, and in particular, the Case of the Countess of *Roscommon v.*

(c) 3 Bro. 310.

(d) 3 Cha. Cas. 55. But see Mr. Sugden's observations on these Cases, in his valuable work on Powers, ed. 3.

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Fowke (e), determined in the *House of Lords*. In that Case the Power was to revoke, by *any Writing*, under the hand and seal of the Donee, attested by two or more credible Witnesses; and *by the same, or any other Deed*, to limit new Uses; and yet it was held, the Power might be executed by *Will*. I cannot, after this Authority, decide that this Will is not an execution of the Power, without first having the opinion of a Court of Law.

Let the Demurrer stand over until the opinion of a Court of Law has been obtained.

(e) 4 Bro. P. C. 523.

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RICHARD TOWNROW, WILLIAM MATTHEWS,
and WILLIAM BATEMAN Plaintiffs,

v.

JOHN BENSON, WILLIAM JOHNSON, and JOHN
JOHNSON Defendants.

29th April.

THE Bill stated, That on or about the month of October 1813, *John Benson*, of, &c., Attorney at Law (one of the Defendants), was, or pretended to be, possessed of certain Lands, Tenements, and Hereditaments, situate at *Sandtoft*, in the several Parishes of *Belton* and *Epworth*, in the County of *Lincoln*, consisting of a Farm and 300 Acres of Land, or thereabouts; and to have good Right and Title to let and demise the said Hereditaments and Premises to a Tenant from year to year:—That by an ancient custom of the said Parishes and County in which the said Hereditaments and Premises are situate, an off-going Tenant of any Farm or Lands within such Parishes of *Belton* and *Epworth* are entitled to certain Allowances and Payments, at the expiration of his Term, from his Landlord, which are called his way-going Crops, or Tenant-right, and which consist of a certain reasonable compensation for all such Tillage and Half-tillage, and Manure, as may be in and upon the said Farm or Lands at the expiration of his Tenancy:—That in, and for some time previously to the said month of October 1813, one *John Burtsby* was the Tenant or Occupier of the aforesaid Farm and Lands at *Sandtoft*; and that in or about the said month of October 1813, the

Bill for an Injunction to restrain proceedings at Law for Rent, on the ground of an Agreement under which the Landlord was indebted more than the amount of the Rent. Held, on Demurrer, that it was a legal set-off, and Demurrer allowed.

Query, Whether this Court can relieve by allowing an equitable set-off on a demand for Rent?

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Defendant *John Benson*, offered and proposed to the Plaintiff *Richard Townrow*, to let and demise the said Farm and Lands to the Plaintiff *Richard Townrow*, as Tenant, provided the said *John Burtchby* would give up the Possession, and the said *Richard Townrow* would pay to the said *John Burtchby* the value of his Tenant-right; and the Defendant *Benson* and the Plaintiff *Townrow*, entered into a Treaty for that purpose:—That in consequence of such Proposal and Treaty, the Plaintiff *Townrow* entered into an Agreement with the said *John Burtchby*, by which the latter agreed to give up to the Plaintiff *Townrow*, the Possession of the said Farm and Lands, on being paid such sum of Money as he the said *John Burtchby*, as off-going Tenant, should be entitled to, according to the said custom of the County:—That the Plaintiff *Townrow*, thereupon applied to the Defendant *Benson*, to prepare a proper Agreement for the valuation of such Crops of what the said *John Burtchby* was so to be entitled to as off-going Tenant; and the Plaintiff *Townrow* requested the Defendant *Benson*, in preparing the same, to take care that the Plaintiff *Townrow* should not agree to pay the said *John Burtchby* any sum of Money, or make him any Allowances as off-going Tenant, which the Plaintiff *Townrow*, when he should quit the said Farm and Lands, would not himself be allowed or entitled unto as off-going Tenant of the same Premises:—That the Defendant *Benson* caused an Agreement in writing to be prepared and engrossed, which was afterwards signed by the Plaintiff *Townrow* and the said *John Burtchby*, in the presence of *William Becket*, at *Doncaster*, the Partner of the Defendant *Benson*, and witnessed by *Thomas Littell*, the Clerk to the said *John Benson* and *Thomas Beckett*, and

bore date on or about the 20th of December 1813; whereby it was agreed between them, that the said *John Burchby* should give up to the Plaintiff *Townrow*, the Possession of the said Farm and Premises at *Sandtoft*, in the said Parishes of *Belton* and *Epsworth*, on being paid such sum of Money, as off-going Tenant, as he should appear to be entitled to by virtue of a valuation to be made in pursuance of the said Agreement:—That in pursuance of the said Agreement, a valuation was made of what the said *John Burchby* was entitled to, as off-going Tenant of the said Farm and Premises, according to the custom of the said County, by which it appeared that the same amounted to the sum of 1,200*l.* or thereabouts, and which Sum the Plaintiff *Townrow*, afterwards, with the privity and knowledge, and direction of the Defendant *Benson*, paid to the said *John Burchby*:—That in further pursuance of the Treaty between the Plaintiff *Townrow* and the Defendant *Benson*, they came to an Agreement together, by which the Defendant *Benson* agreed that he would demise the said Farm and Premises to the Plaintiff *Townrow*, as Tenant from year to year, at the yearly Rent of 500*l.*, and that the Plaintiff *Townrow* should have Possession of the Arable Land as from the 11th of October then last past, and of the House and Grass Land from the 13th of May then next:—That no Memorandum of such Agreement was made in writing; but that, in pursuance of such Agreement, the Plaintiff *Townrow* entered into Possession of the said Farm and Lands as and from the respective times before mentioned, and the Defendant *Benson* accepted the Plaintiff *Townrow* as his Tenant of the said Farm and Lands, and the Plaintiff *Townrow* continued to occupy the said Farm and Lands, as Tenant thereof to the Defendant

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Benson, until the time hereinafter mentioned; and the Plaintiff *Townrow* from time to time paid Rent for the said Farm and Lands to the Defendant *Benson*, as the Landlord thereof, who, as such Landlord, received the same from the Plaintiff *Townrow*:—That in 1816, the Plaintiff *Townrow* became desirous of quitting the Possession of the said Farm and Lands, and he gave half a year's previous Notice of such his intention, to the Defendant *Benson*, by which the Plaintiff *Townrow* informed him, that he intended to deliver up to him, or to whom he might appoint, the Possession of the said Farm and Lands on the 10th of October 1816, or at such other time or times as his then present year's Tenancy should expire:—That the Plaintiff *Townrow* accordingly delivered up the Possession of the said Farm and Lands to the Defendant *Benson*, on the said 10th day of October 1816, and the Defendant *Benson* took Possession thereof accordingly; and let the same to other Tenants as he thought proper; and the Plaintiff *Townrow* then requested him to allow to and pay the Plaintiff *Townrow*, the amount of his Tenant-right as off-going Tenant of the said Farm and Lands, and to deduct therefrom the amount of the Rent then due to him from the Plaintiff *Townrow*, as his Tenant of such Farm and Premises, but the Defendant *Benson* refused, without giving any reason for such his refusal so to do:—That Plaintiff *Townrow* thereupon caused Notice to be given to the Defendant *Benson*, that the Plaintiff *Townrow* intended a valuation to take place, on the 14th November 1816, of the Tenant-right and Interest which he was entitled to in respect of the said Farm and Lands; and that the Plaintiff *Townrow* had appointed *George Hutchinson* of, &c. Farmer, to value the same on his behalf, and

requested the Defendant *Benson* to appoint some other Person to value such Tenant-right and Interest on behalf of the Landlord, at the time aforesaid; and also, that in case no Person should attend on behalf of the Landlord at the time aforesaid, the Plaintiff *Townrow* had appointed *Thomas Dyson*, of, &c. Gent. and *George Brooke*, of, &c. to make the said valuation, along with *George Hutchinson*, who would proceed on the same on the 18th of November 1816:—That no Person attended on the part of the Defendant to value the Tenant-right on the 14th November 1816, and *Brooke, Dyson* and *Hutchinson*, therefore, at the request of the Plaintiff, proceeded, on the 18th November 1816, to value the same, and they made their valuation, the particulars of which were reduced into writing, and a Memorandum thereof was signed by them, by which the amount of the Tenant-right due to the Plaintiff, appeared to be the Sum of 692*l.* 10*s.* 11*d.*:—That the Plaintiff soon after, sent a copy of the valuation to the Defendant, and demanded the amount, after deducting a year's Rent due from the Plaintiff, but the Defendant refused to pay the same:—That by the custom of the Parishes and County in which the Farm and Land are situated, an off-going Tenant is entitled, after he has quitted Possession of such Farm and Lands, to reap and have the benefit of the Crops sown in the last year of his Tenancy, upon paying or allowing standage for the same:—That the Plaintiff sowed sixty Acres with Wheat and Rye during the last year of his Tenancy of the Farm and Lands, which Crops were not included in the valuation of Tenant-right hereinbefore mentioned, because the Plaintiff expected to be allowed to reap the same:—That in August 1818, the Plaintiff

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requested the Defendant to permit him to reap the Crops sown by him, upon paying standage for the same, but the Defendant refused to permit him, and insisted on reaping the same for his own benefit, and did reap the same, and made no Compensation to the Plaintiff. The Bill then charged, That the Plaintiff is entitled to stand in the place of *Burtonby*, and to have the same allowances, in respect of Tenant-right, as he would have been entitled to if he had retained the Possession of the Farm in 1816, and had then given up the same to the Landlord, as the Plaintiff did:—That the Defendants, or some of them, have had the benefit of the Tillage, Half-tillage, Manure, and Crops, left by the Plaintiff in and upon the Farm and Lands, and have lately let the same to some other Person or Persons, and have, or might have received from them, when they took Possession, the value of such Tillage, Half-tillage, Manure, and Crops, as were in and upon such Farm and Lands; but Defendant refuses to make any allowance in respect of the same:—That the Defendant, in 1816, distrained upon the Stock and Effects of the Plaintiff upon the said Farm and Lands, for Rent due in respect of the Premises, and that the Plaintiff replevied the same, and executed to the Sheriff of the County of *Lincoln*, a Replevin Bond, in the Penalty of 1,000*l.*; and that the Defendant *Benson* has since obtained an Assignment of the said Bond from the Sheriff, and has commenced Actions against the Plaintiffs *Matthews* and *Bateman*, upon the same, to recover the Penalty of the Bond, and threatens to proceed to Trial on the said Actions; and intends to commence an Action against the Plaintiff unless restrained by Injunction, although the amount of the Rent due is less than the

amount of the Allowances to which the Plaintiff *Townrow* is entitled. The *Prayer* of the Bill, was for an Account, and an Injunction to restrain proceedings in the Actions, and from commencing any Action or Actions against the Plaintiff in respect of the Arrears of Rent, or proceeding in any manner against the Plaintiffs, or any of them, respecting the Premises aforesaid.

To this Bill a general Demurrer was put in by the Defendants *Benson* and *Johnson*.

Mr. Horne, and *Mr. Treslove*, in support of the Demurrer:—

Here the Set-off, if any, might have been made available at Law. It is a Legal Set-off, and therefore cannot be enforced in this Court.

Mr. Agar, and *Mr. Parker*, *contra*:—

There is not, perhaps, any Case where a Legal Set-off has been enforced in a Court of Equity; but this is an Equitable Set-off, arising out of the Agreement with the Plaintiff *Benson*, who, on letting the Farm and Lands to *Burthby*, agreed to make certain Allowances to him, which the Plaintiff *Townrow*, as the Assignee of the Lease from *Burthby*, was entitled to, and which, if the Agreement had been in writing, would have constituted a Set-off at Law.

The VICE-CHANCELLOR:—

The Tenant here claims to set-off a legal demand against the Distress of his Landlord for Rent. The policy of the Law does not permit a set-off against a

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Distress for Rent; and a Court of Equity must follow the Law, and cannot relieve against the rule of Law, where the claim to set-off is founded on a legal demand. It is not necessary to consider how the Case might be if the Tenant had a counter demand, not at Law, but in Equity.

Demurrer allowed.

2d May.

Legacy of
3,000*l.* Stock, to
L. E. (*Testator's*
Wife) *for Life,*
and after her
death, one-third
part of the prin-
cipal to Testator's
Son, J. E. if he
shall be then

*living, and if dead, to his Child or Children; and a Bequest, in the same manner, of one-third to each of his two Daughters, M. A. E. and H. E. with a Proviso, that if either of his Daughters should die unmarried, and without Issue, the surviving Daughter to take both Shares; and if both die unmarried, and without Issue, then the Shares to go to his Son, J. E. if living, or if dead, to his Children. He then gave the residue of his Property, consisting of Real and Personal Estate, to Trustees; and, by a Codicil, certain other Real Estates, to convert the same into Money, in Trust, as to one-third, for his Son, J. E.; and the other two-thirds equally amongst his Daughters, subject to such Contingencies in favour of their Issue, and with the like benefit of Survivorship, as were before declared as to the 3,000*l.* Stock. L. E. the Testator's Wife, died.. Held, that on her death the Daughters took vested Interests in their Shares of the 3,000*l.* Stock, and of the Residue, and Produce of the Real Estates.*

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Edwards, and her Assigns, for and during the term of her natural Life; "and I declare that her receipt, notwithstanding any future Coverture, shall be a sufficient discharge for the same. I also give to my said Wife, all the Household Furniture, Plate, Linen, and China, in and about my House at K.; and also, all my Horses and Implements of Husbandry, Hay, Straw, Corn and Liquors, in my said House (all growing Crops excepted); also, the Sum of 50*l.* to be paid to my said Wife immediately on my decease; also, I give and bequeath to her the use of my Dwelling-House at K. aforesaid, for one year, to be computed from the time of my decease; and from and immediately after the decease of my said Wife, the said 3,000*l.* Capital Stock to be paid, applied, and disposed of in manner hereinafter mentioned (that is to say); one-third part thereof to my Son, *John Edwards*, if he shall be then living, and if dead, to such Child or Children as he may happen to leave, if more than one, to be equally divided amongst them; one other third Part or Share, to my natural or reputed Daughter, begotten on the body of *Louisa* my now Wife, called and distinguished by the name of *Mary Ann Edwards*, if she shall be living at the decease of my said Wife, and if dead (at such time leaving lawful issue), then to such Child as she may happen to leave, or Children, if more than one, in equal Shares; and the remaining third Part or Share of and in the said Capital Stock of 3,000*l.*, unto my natural or reputed Daughter, begotten on the body of *Louisa* my now Wife, called and distinguished by the name of *Hannah Edwards*, if living at the time of my Wife's decease, and if dead (leaving lawful Issue), then to such Child or Children as she may happen to leave, if more than one, to be equally divided amongst them

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Provided always, that if either of my said Daughters shall die unmarried, and without Issue, then it is my Will, that the surviving Sister shall take the Share of her so dying; and if both of them, my said Daughters, shall die unmarried and without Issue, then the Shares so given to, or intended for each of them, to go to my Son, *John Edwards*, if living, and if dead, to his Children, in equal Shares:—I give and devise, all my Messuages, Farms, Lands, Tenements, and Hereditaments, as well Freehold as Copyhold and Leasehold, situate, &c. unto my said Trustees and Executors, their Heirs, Executors, Administrators and Assigns, according to the nature of the said Estates respectively, upon Trust, that they do and shall sell and dispose thereof, as soon as conveniently may be after my decease, for the best price or prices that can reasonably be obtained for the same, and do and shall apply the Money arising therefrom, in manner hereinafter mentioned; and I declare, that the Receipt of my said Trustees, or of any one of them, for the Purchase-Money, shall be a good Discharge for the same:—I give to my Servants, *Mary Bellis* and *Diana Kenrick*, if living with me at the time of my decease, 20*l.* a-piece:—I give and bequeath, my Gold Watch to my said Son, *John Edwards*, and my Library of Books to my said three Children, and if any difference shall arise about the division or partition thereof, the same to be settled by my Executors:—I give and bequeath all the rest and residue of my Capital Stock and Money in the Funds (over and besides the said Sum of 3,000*l.*), and also, all the Money arising from the Sale of my said Estates, together with the Rents, Issues and Profits thereof in the mean time; and also all Money due and owing to me upon or by virtue of my Mortgage Bond, or otherwise, and all other my

Personal Estate, of what nature or kind soever (not hereby before bequeathed), subject to my just Debts and Funeral Expences, unto my said Trustees and Executors, in Trust, that they do pay, assign, transfer or dispose thereof, in manner following; (that is to say) one-third Part thereof to my said Son, *John Edwards*, and the other two-third Parts thereof equally between my said two Daughters, subject to such Contingencies in favour of their Issue, and with the like benefit of Survivorship, as are hereinbefore expressed and declared touching the said Capital Stock of 3,000*l.*: —I devise all such Messuages, Lands, and Hereditaments, of which I am Mortgagee in Fee, unto my said Trustees and Executors, in order to enable them, upon receipt of the Money due thereon, to re-lease and reconvey the same to the Person or Persons entitled to the Equity of Redemption thereof:—I desire that my Trustees may not be answerable the one for the other, that they may reimburse themselves all their Expences, and that they may have a reasonable Compensation for their trouble in executing the Trusts in them reposed:—I direct, that the receipt or receipts of any Parent or Guardian, of any Infant or Infants entitled to any Legacy, sum or sums of Money, shall be a good discharge to my Executors; and that the Interest arising from any Legacy or Money to which any Infant or Infants may be entitled, shall be laid out, during their minority, either by my said Trustees and Executors, or the Guardian or Guardians of such Infant, for their Maintenance and Education.”

The Testator made a Codicil to his Will, dated the 20th of November 1807, as follows: “ I, *John Edwards*, &c. do make this Codicil to my last Will and

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Testament.—Whereas, since the date and execution thereof, I have purchased from G. T. F. Esq. and his Trustees, certain Tenements, Lands and Hereditaments, situate in the Parish of *Northop* in the said County of *Flint*, and the same have been re-leased and conveyed unto and to the use of me, of my Heirs and Assigns for ever: Now I do hereby give and devise the said Tenements, Lands and Hereditaments so purchased by me as aforesaid, with their Appurtenances, unto and to the use of the Trustees named in my said Will, of and concerning my Real Estates thereby devised, and their Heirs and Assigns for ever, upon and for such and the same Trusts, Intents and Purposes, and with, under, and subject to, such and the same Limitations, Provisoes, Declarations and Conditions, as in and by my said last Will and Testament are limited, expressed and declared, of and concerning my Real Estates thereby devised, and upon and for no other Trust, Intent or Purpose whatsoever.—I confirm my said Will in all respects.”

The Testator died 20th May 1816. *Louisa Edwards*, the Testator's Wife, died in his Life-time; but the Testator, at the time of his death, left surviving, *John Edwards*, his Son; the Plaintiff *Mary Ann Laffer* (late *Edwards*), his Daughter, who married previously to the death of the Testator; and *Hannah Ethelston* (late *Edwards*), another Daughter, who also married before the death of the Testator. *Hannah Ethelston* had three children by her Husband, all Infants.

The Plaintiff *Laffer*, in Right of his Wife *Mary Ann*, claimed to be entitled to the Legacy of 1,000*L* four-per-cent. Consols, together with the Plaintiff *Mary Ann*

Laffer's one-third Part of the Residue of the Testator's Personal Estate, as well as to one-third Part of the Produce of the Real Estates of the Testator, when the same should be sold. The *Prayer* of the Bill was for an Account, and that the Rights of the Plaintiffs might be declared.

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The Defendant, *John Edwards*, by his Answer, submitted that in case of the death of the Plaintiff *Mary Ann Laffer*, and of the Defendant *Hannah Ethelston*, without Issue living at either of their decease, he was entitled to the Sums of 1,000*l.* and 1,000*l.* four-per-cent. Consols, bequeathed to them by the Testator's Will, as well as to two third Parts or Shares of the said *Mary Ann Laffer* and *Hannah Ethelston* in the Residue of the Testator's Personal Estate, and also to the two third Shares of them in the Produce of the Real Estates of the Testator, inasmuch, as he submitted, such Legacies are at present contingent only, and cannot vest until their respective deaths, leaving Issue at the time of their respective deceases; and that upon the deaths of *Mary Ann Laffer* and *Hannah Ethelston*, without Issue at either of their decease, such respective 1,000*l.* and 1,000*l.* four-per-cent. Consols, and their Shares in the Residue of the Testator's Personal Estate, and in the Produce of the Real Estates, will become absolutely vested in the Defendant.

Mr. *Wetherell*, and Mr. *Richards*, for the Plaintiffs; and Mr. *Bell*, and Mr. *Shadwell*, for such of the Defendants as were in the same Interest with the Plaintiffs:—

After the cases of *Maberley v. Strode* (a), and *Bell v. Phym* (b), the words "that if either of my Daughters

(a) 3 Ves. 450.

(b) 7 Ves. 454.

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shall die unmarried, and without Issue," must be construed "unmarried, or without Issue." But still the Daughters, having survived the Widow, take vested Interests in the Shares of the 3,000*l.* given to them, the limitation over being only intended to apply to the case of a death before the Widow; for on the death of the Widow the 3,000*l.* Stock is to be paid, assigned, or disposed, 1,000*l.* to each Daughter, if then living, and if dead, to such Child as she should leave, or Children, if more than one; therefore each Daughter, if living, seems intended to take a vested Interest, and the subsequent limitation intended only to take place if either or both Daughters should be then dead, without leaving any Issue; *Weddell v. Mundy* (c): for otherwise, if a Daughter died before the Widow, leaving a Child or Children, such Child or Children immediately took a vested Interest, but if the Daughter happened to survive the Widow, neither the Daughter nor any of her Children could take an absolute Interest until the death of the Daughter. There is, certainly, some difficulty in applying some parts of this reasoning to the case of the Residue, as the payment or transfer of it does not depend on the Life of the Widow, and it is to be paid or transferred subject to the Contingency in favour of Issue, and with like benefit of Survivorship, as is before expressed:—but the only Contingency before expressed in favour of Issue, is, if either Daughter should be dead at the death of the Widow, leaving a Child or Children; and the Court cannot take from the Children the benefit of this Contingency, or apply it to any other period, and then the benefit of Survivorship must be confined to the same period. Perhaps the meaning may be, subject to such Contingency in case

(c) 6 Ves. 341.

of the death of a Daughter before the time of transfer or payment, that is, before the Testator's own death; but that, in the events which have happened, would make no difference. In the events that have happened, the Daughters took vested Interests in their Shares of the Residue, as well as of the 3,000*l.* and the produce of the real Estate.

Mr. Hart, for the other Defendants:—

The VICE-CHANCELLOR:—

In the events that have happened, the Interests vested absolutely in the Daughters.

The deaths of the Daughters unmarried, and without Issue, is, as to their Shares of the 3,000*l.*, plainly referrible to their deaths in the life-time of the Wife. If the Wife had survived the Testator, they surviving her, would, upon her death, have taken such Shares absolutely; and the Wife having died before the Testator, the Daughters took the same Shares absolutely upon his death. The only Contingency in favour of their Issue as to these Shares, was the chance of their deaths in the life-time of the Wife.

There is some inaccuracy of expression in the general Residuary Clause, but the manifest intention is, that the Daughters should take the same interest in the general Residue which they took in their Shares of the 3,000*l.*

1818.

LAFFER
and UX,
v.

EDWARDS
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1818:

RICHARDSON v. EVANS.

ad May.

Proviso in a Lease, that Lessee should not demise the Premises, without a Licence in writing. A Parol Licence to underlet insufficient; but if such Licence is given as a snare, and under circumstances of Fraud, this Court will relieve.

IN this Case a Lease was granted, containing a clause that the Lessee should not assign or demise the Premises without the consent of the Lessor in writing. The Bill was filed by the Plaintiff, against the original Lessor and Lessee, for a specific performance of an Agreement for an Under-Lease, stating a parol consent by the Defendant, the original Lessor, to an Under-Lease, by the original Lessee, to the Plaintiff; and circumstances to show Fraud in the original Lessor, but the Evidence did not amount to proof of Fraud.

Mr. Hart, and Mr. Roupell, for the Plaintiff:—

Sir Samuel Romilly, and Mr. Heald, for the Defendant:—

The VICE-CHANCELLOR:—

Under such a Proviso as this in a Lease, a parol Licence to underlet is not sufficient in Equity, any more than at Law, unless such parol Licence is used as a Snare, and under circumstances which amount to a Fraud, in which case this Court will give relief. There is no proof here that the original Lessee was induced by the conduct of the original Lessor to underlet these Premises without a written Licence; or that that the Plaintiff, relying upon this parol Licence, has suffered any injury or inconvenience.

Bill dismissed, with Costs.

BRAMLEY v. TEAL.

THIS was a Bill for a specific performance, against the Purchaser of an Estate.

Mr. *Munroe*, now moved for the payment of the Purchase-Money into Court, upon an Affidavit, that the Purchaser, who was in Possession, had drained the Lands, and put a new roof to a House, and changed Tenants. He cited *Cutter v. Simons* (*a*). Notice of the Motion was given, but nobody appeared.

4th May.
Purchaser in
possession, who
has made Alter-
ations and Im-
provements on
the Estate,
ordered to pay
the Purchase-
Money into
Court.

The VICE-CHANCELLOR:—

Where an Estate is deteriorated by a Purchaser in Possession, it is reasonable he should pay his Purchase-Money into Court, because he diminishes the value of the Lien which the Vendor has upon the Estate for his Purchase-Money; but where the Estate is ameliorated, the value of the Lien is increased, and the Vendor's security improved. On the authority, however, of the Case cited, and as nobody appears on the Motion, you may take an Order.

Motion granted (*b*).

(*a*) 2 Meriv. 105.

(*b*) See post, *Gell v. Watson*.

1818.

7th May.

An Injunction, when sealed at the next Seal, operates from the Order, not from the Sealing. **A**N Order for an Injunction had been obtained for want of an Answer; and before the Injunction was sealed at the next Seal after the making of the Order, an Answer was put in; and the question, on a Motion to set aside the Injunction, was, whether the Injunction operated retrospectively from the date of the Order, or from the sealing of the Injunction?

Mr. *Fonblanque*, for the Motion:—

Mr. *Whitmarsh*, *contra*, cited *Bruce v. Webb* (a).

The VICE-CHANCELLOR:—

The Injunction, when sealed at the next Seal, operates from the time the Order is made for it.

Motion refused, with Costs.

(a) 2 Meriv. 474.

1818.

EYRE v. BARTROP.

7th May.

IN 1809, *E. V. Eyre*, the Brother of the Plaintiff, granted an Annuity to *R. B. Skurray* and *R. Skurray*, of 217*l.* 14*s.* during his life, and the Plaintiff joined with him in the Grant, as a Surety, for the payment of the same quarterly. In the Annuity Deed it was provided, that *E. V. Eyre*, or the Plaintiff, should, on seven days notice, be at liberty to redeem the Annuity on the payment of 1,384*l.* 8*s.* 6*d.*, which was something more than the Purchase Money. The Annuity was further secured by demise to *W. H. Skurray*, a Trustee, for ninety-nine years, of certain real Property, by *E. V. Eyre*, and a Bond and Judgment of *E. V. Eyre* and the Plaintiff.

*Giving time
to the Principal,
the Grantee of
an Annuity,
exonerates the
Surety from past,
as well as future,
Arrears.*

Some time after, this Annuity was, by Deed, 12th January 1810, assigned by *R. B. Skurray*, and *R. Skurray*, to the Defendant, together with the benefit of the Securities, and the Defendant entered into a new Agreement with *E. V. Eyre*;—and by Indenture, 12th January 1810, reciting the before-mentioned Grant of the Annuity; and also another Indenture, 22d July 1812, under which the Defendant was entitled to another Annuity of 125*l.* granted by *E. V. Eyre*; and after reciting that all arrears of the Annuities had been paid, and that Defendant was willing, and had consented, to allow to said *E. V. Eyre* new and more advantageous terms of re-purchasing said first-mentioned Annuity, and also the subsequent Annuity;—the *Skurays*, with the privity

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v.
BARTROP.

of *E. V. Eyre*, who was a party to the Deed, assigned the Annuity of 217*l.*, and the Securities, to the Defendant, and a new Trustee of the Defendant's, subject to such Right of Re-purchase as was reserved in the Grant of that Annuity; "and it was thereby declared and agreed, by and between Defendant and *E. V. Eyre*, his Heirs, &c., that Defendant, his Heirs, &c. shall not, nor will, at any time thereafter, until the expiration of five years from the date of the Deed, or until the death of *Edward Eyre*, the Father of *E. V. Eyre*, (which should first happen), demand or sue for either of the said Annuities of 217*l.* 14*s.* and 125*l.* or any part thereof, or for any payment for or on account of either of the said Annuities;" and it was further agreed that the said Annuities should, on certain conditions, be redeemable by *E. V. Eyre*, on more favourable terms than those originally stipulated for in the Grants of the Annuities.

Edward Eyre the Father survived the five years, and was living, and the Annuities were not redeemed, or the Arrears paid to the Defendant.

E. V. Eyre being pressed for the Arrears of the Annuity, the Defendant, by Agreement, 23d February 1815, consented to receive them by Instalments; the payment of them to be secured by a Judgment acknowledged by *E. V. Eyre*.

The Plaintiff was not a party to the Deed of the 12th January 1810, nor concurred in its provisions; nor was he a party to the Agreement of the 23d February 1815.

The Instalments not being paid, the Plaintiff was called upon to pay the arrears of the first mentioned Annuity, and the Defendant threatened to take out execution against him upon the Judgment; but the Plaintiff contended, that in consequence of the Deed of January 1810, and the Agreement in 1815, he, as Surety, was discharged.

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BARTROP.

The *Prayer* of the Bill was, that it might be declared that the Plaintiff, as a Surety for the payment of the Annuity according to the terms of the Indenture of the 1st May 1809, became released and discharged therefrom by the effect of the subsequent dealings and transactions between the Defendant and *E. V. Eyre* respecting the same; and that the Defendant might be restrained from issuing execution on the Judgment, and from commencing an Action, &c., or from otherwise proceeding in respect of the said Annuity.

An Injunction was obtained, for want of an Answer, until further Order.

A Motion was now made to dissolve the Injunction upon the coming in of the Answer.

The *Answer* admitted the Facts stated in the Bill, except that it did not admit that the Plaintiff was a Surety only; but notice was given to produce the original Deed, on the face of which it appeared he was only a Surety.

Mr. Bell, and Mr. Wilbraham, in Support of the Motion:—

The Plaintiff is a mere Surety, and the effect of giving time to the Principal, without the consent of the Surety,

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November following; and it was agreed the Defendant should have Possession on the 25th March 1810. It was also agreed the Timber should be valued and paid for. The Defendant paid 3,600*l.* in part payment of the Purchase Money, and also the Sum of 1,000*l.* on account of the Timber. An abstract of the Title was delivered to the Defendant, which was objected to, but the Defendant entered into Possession of the Estate on the 25th March 1810, and made alterations, pulling down Buildings, and erecting others, and permitted a Turnpike Road to be made through the Estate; and agreed to sell part of the Estate, and received part of the Purchase Money. A Bill was filed by the Plaintiff for a specific performance of the Agreement, which was answered by the Plaintiff. The Title was not rendered complete until an Act of Parliament was obtained in 1817.

Sir *S. Romilly*, and Mr. *Sugden*, in Support of the Motion:—

By the alterations on the Estate, and the Agreement to re-sell part, the Defendant is, according to *Cutler v. Simons* (a), bound to pay in the residue of his Purchase Money. By re-selling, the Plaintiff is under the necessity of making such new Purchaser a Party to the Suit: under these circumstances, and after such a length of Possession, it is but reasonable that the Defendant should pay in the residue of his Purchase Money.'

Mr. *Bell*, contra:—

The Defendant was desirous of completing the Purchase, but the abstract did not show a clear Title. In

(a) 2 Meriv. 103.

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1817, an Act was obtained to enable them to complete the Title. Whether the Title is now complete, will be seen when the *Master* has made his Report. At present the Defendant ought not to pay in the residue of his Purchase Money.

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GELL

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The VICE-CHANCELLOR:—

Here the Possession was according to the Agreement, and the length of Possession without payment of the residue of the Purchase Money is sufficiently accounted for, the Defendant not having been able to obtain a good Title to his Purchase. The Act of Parliament to complete the Title was obtained after the Bill was filed. The Defendant insists that the improvements on the Estate, and the contract to sell part, are not, under the special circumstances, to be construed as an acceptance of the Title, and he is fortified in this defence, by the Plaintiff having thought it necessary on his part to obtain the Act of Parliament. Without impeaching, therefore, the Case cited, I think this Motion cannot be granted.

Motion refused, without Costs.

1818.

19th May.

Ex parte PRICE, in re LANE.

A PETITION was presented, to supersede a Commission. The Petition stated (amongst other things) that an Action had been brought, in which the validity of the Commission would be considered.

When the Petition came on to be heard, no Counsel appeared for the Respondent.

Mr. Montagu, on behalf of the Petition, insisted that the Commission ought to be superseded.

The VICE-CHANCELLOR.

As it appears by the Petition that an Action has been brought, in which the validity of the Commission will be tried, I shall not supersede the Commission, but give the Petitioner leave to bring on his Petition again when that Action shall have been tried.

1818.

Ex parte JANSON, in re CORF.

19th, 25th May.

THE Petition stated that, on the 11th May 1811, a Commission issued against *Corf*, and Assignees were chosen:—That previous to his Bankruptcy he carried on Business in Co-partnership with *Deveryhouse*, which Partnership was dissolved in 1807; and by Indenture, dated 1st August 1807, *Deveryhouse* assigned to *Corf* the Stock in Trade, Debts, and Effects of *Deveryhouse*, jointly with *Corf*, in Trust, to apply the same in discharge of the Debts and Engagements of *Corf* and *Deveryhouse* jointly, and if a Surplus, to divide it between them. *Corf* took possession of the joint Estate and Effects, disposed of the same, and as far as he was able, and with other means, paid Debts to a greater amount than the Property got in, and several of the joint Debts remained undischarged at the Bankruptcy of *Corf*; and at the time of issuing the Commission against *Corf*, there was no available joint Estate and Effects of the Bankrupt and *Deveryhouse*:—That there is remaining in the hands of the Assignees of *Corf* (after payment to his separate Creditors of two several Dividends of 1*s.* in the Pound, ordered under the Commission), sufficient to pay the Petitioner, and the rest of the unpaid Creditors of the Co-partnership, proved, under the Commission, 2*s.* in the Pound on their Debts:—That the Petitioner, and others, have proved Debts under the Commission, as owing to them from the Bankrupt, and *Deveryhouse*, on the Co-partnership account; and at a Meeting of the Commissioners,

C. and D.
were in Partner-
ship, and the same
was dissolved.
D. carried on
afterwards a
Trade, and
became bank-
rupt, and C. was
insolvent. Held,
that the joint
Creditors of C.
and D. could not
prove against the
separate Estate
of D.

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*Ex parte
JANSON,
in re
CORF.*

the Petitioner claimed to be entitled, under the circumstances before stated, to a Dividend in respect of his joint Debt, out of the separate Effects of *Corf*; but the Commissioners refused to make such Dividend, on the ground that, though *Deveryhouse* was alleged to be *insolvent*, he had not been declared a *Bankrupt*. The *Prayer* of the Petition was, that the Commissioners might be directed to order a Dividend, of the remaining Estate and Effects of the Bankrupt, to be made amongst the joint Creditors of the Bankrupt and *Deveryhouse*, who have proved, or shall prove, Debts under the Commission, from and out of the separate Estate and Effects of the Bankrupt, equally with the separate Creditors of the Bankrupt; and also the Costs of the Application.

The *Solicitor-General*, in support of the Petition:

There is no Case exactly in point. It has been held, that a joint Creditor of a Partnership which has ceased, may be admitted to prove, under a subsequent Commission, against one of the *quondam* Partners, where there were no joint Effects, and the other Partner was a *Bankrupt*; and the Insolvency of the Partner seems equivalent to his *Bankruptcy*.

Mr. Cullen, *contra*:—

Insolvency is not equivalent to *Bankruptcy*. In the former case he may be able to pay something, perhaps the greater part of the Debt; but if a *Bankrupt*, there can be nothing to pay in respect of the joint Debts. Here it does not appear, as in the Case of *Bankruptcy*, that there is no joint Estate which can be rendered available for the payment of the Petitioner.

The VICE-CHANCELLOR:—

Though a Person may be insolvent, he may yet be able to pay a considerable part of his Debts, for Insolvency means only that the Party is unable to pay all his Debts, but in case of Bankruptcy, his whole property is absorbed by the Commission: the effect, therefore, of Insolvency and Bankruptcy is different; in the latter case there can be no other fund than the separate Estate; in the former there may. As, however, this is a new and important question, I shall communicate with the *Lord Chancellor* on the subject.

1818.

*Ex parte
JANSON,
in re
CORF.*

The VICE-CHANCELLOR:—

I mentioned this Case to the *Lord Chancellor*, and he concurs with Me in opinion, that the mere *Insolvency* of the Co-partner does not, as his *Bankruptcy* would do, entitle the joint Creditors to prove upon the separate Estate of the Bankrupt Partner; the principle being, that whilst there is any other fund, however small, to resort to, the joint Creditors cannot prove against the separate Estate of one of the Partners who has become Bankrupt.

25th May.

1818.

SHELLY v. NASH and another.

28th May.

*A Sale of a
Reversion by
Public Auction,
held good, and
the Purchaser
not bound to
show he has
given the full
value.*

THE material facts in this Cause, as they appeared on the Pleadings, were, that the Defendants, in consequence of an Advertisement in the public Papers, of a Sale, 4th March 1814, by Public Auction, at *Garraway's*, of a Reversion of 8,000*l.*, secured on Freehold Property, attended the Sale, at which time printed particulars were distributed as follow:—"The Reversion of 8,000*l.* sterling, to be most amply secured upon valuable Freehold Property, and made payable at the decease of the Survivor of two Gentlemen, one (the Grandfather of the Plaintiff), between eighty and ninety, and the other (the Father of the Plaintiff) upwards of sixty years of age, in case they are both survived by a Gentleman in his twenty-second year."

The Defendants were declared the highest Bidders, at the Sum of 2,593*l.* 10*s.*, and paid a deposit of 519*l.* and signed an Agreement for the Purchase.

The Defendants, previous to the purchase, had no knowledge of the Plaintiff, or his circumstances, nor even knew the Name of the Vendor, until they applied for an abstract of the Title to the Reversion on which the Money was to be secured.

On the 6th July 1814, the Purchase Money was paid, and the Securities executed.

The Grandfather of the Plaintiff died 6th January 1815.

By the evidence of *Morgan*, the Actuary of the Equitable Assurance Office, he stated, that 3,540*l.*, or thereabouts, was the fair value of the Reversionary Interest of 8,000*l.* on the before-mentioned Contingency; and that only 5,860*l.* ought to have been secured to be paid upon the happening of the Contingency, in consideration of the Sum of 2,593*l.* 10*s.*

Frend, the Actuary of the Rock Life Insurance Office, by his Evidence, stated, that 3,653*l.* was the fair price of the Contingency; but that no one at the time (July 1814) would have advanced Money on such conditions, as it was well known that a common mode of borrowing Money was by securing to the Lender 10*l.* per Cent. on the Money advanced, and an Assurance on a Life or Lives, by which the Capital was secured ultimately to the Lender; and that in this way much Money was advanced; but since the great change in the value of Money, several of such Contracts have been dissolved by the Borrower procuring Money at 7*l.* per Cent., and an Assurance on a Life or Lives. That had any Person applied to him on the 1st July 1814, to know what, upon the then mode of lending Money, he should advance for 8,000*l.* to be received upon the aforesaid Contingency, he should have answered, 2,561*l.* 10*s.*; and if he the Deponent had been further asked, what Sum might be expected for the advance of 2,593*l.* 10*s.* at that time, he should have replied 8,099*l.*; but on the propriety of said last mentioned terms, Deponent does not presume to decide; but says, that in Contracts of the like nature, the Contingency of a Law Suit must be taken into consideration.

The object of the Bill was to get the Plaintiff re-

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leased from the Grant, on payment of the Principal Money advanced at 5*l.* per Cent. (*a*), it being a Sale for an inadequate Consideration of a Reversion by an expectant Heir, only twenty-two years of age, and in distress.

Mr. Hart, and Mr. Wingfield, in Support of the Bill:—

It is clear that a Grant by *Private Contract* of a Reversionary Interest, by an expectant Heir, cannot be sustained, but that the Vendor will be relieved in this Court on the payment of Principal, Interest, and Costs, the Purchaser being considered as a Mortgagee. *Peacock v. Evans* (*b*), *Gowland v. De Faria* (*c*). Will then the circumstance of its being a Sale by *Public Auction* make any difference? It is apprehended not. In *Peacock v. Evans*, the *Master of the Rolls* says, that “to that class of Persons (expectant Heirs) this Court seems to have extended a Decree of Protection, approaching nearly to an incapacity to bind themselves to any contract;” and in *Gowland v. De Faria*, he lays down the Rule, generally, that it is incumbent upon those who have dealt with a Reversionary Interest, to

(*a*) There was also an ulterior object, if the first failed, viz. to obtain from the Defendants a release from the effect of the general words introduced into the Deed of Grant to the Defendants, on the ground, that no Hereditaments but those comprised in the Family Settlement of the 20th August 1791, or subject to the Trusts thereof, were in-

tended by the Plaintiff to be charged. The Pleadings, Argument, and Decision on this point are not noticed, it turning merely on a question of fact. From the evidence, it appeared that all the Plaintiff's Lands were to be included in the Grant; and of that opinion was the *Vice-Chancellor*.

(*b*) 16 Ves. 512.

(*c*) 17 Ves. 20.

be able to show that a full and adequate Consideration was paid. It is in proof, in this Case, that an adequate Consideration was not paid. In both those Cases the Purchasers acted *bona fide*; there was no imputation of fraud, but still the principle was applied. If a Sale by Public Auction were to give rise to a different Rule, the greatest frauds would be practised under the colour of such a Sale. Suppose the Interest put up to Sale, and bought in, and another offers, by Private Contract, 500*l.* more, which is still a very inadequate Consideration, could the Purchase be sustained? In this Case the Defendant has not acted dishonourably; he has offered to pay what is conceived to be a fair Sum.

Sir S. Romilly, and Mr. Phillimore, for the Defendants, were stopped by

The VICE-CHANCELLOR:

This is an important question; it has often occupied my attention, and so fixed are my sentiments on the subject, that it is unnecessary to delay the expression of my opinion.

At Law, and in Equity also, generally speaking, a Man who has a power of disposition over his Property, whether he sells to relieve his necessities or to provide for the convenience of his Family, cannot avoid his Contract upon the mere ground of inadequacy of price. A Court of Equity, however, will relieve expectant Heirs and Reversioners from disadvantageous bargains. In the earlier Cases it was held necessary to show that undue advantage was actually taken of the situation of such Persons; but in more modern times it has been considered, not only that those who were dealing for their Expectations, but those who were dealing for

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vested Reversions also, were so exposed to imposition and hard terms, and so much in the power of those with whom they contracted, that it was a fit rule of policy, to impose upon all who dealt with expectant Heirs and Reversioners, the *onus* of proving that they had paid a fair price, and otherwise to undo their bargains, and compel a re-conveyance of the Property purchased. The principle and the policy of the rule may be both equally questionable. Sellers of Reversions are not necessarily in the power of those with whom they contract, and are not necessarily exposed to imposition and hard terms; and Persons who sell their Expectations and Reversions from the pressure of distress, are thrown, by the rule, into the hands of those who are likely to take advantage of their situation; for no person can securely deal with them. The principle of the rule, however, cannot be applied to Sales of Reversion by *Auction*. There being no treaty between Vendor and Purchaser, there can be no opportunity for fraud or imposition on the part of the Purchaser. The Vendor is, in no sense, in the power of the Purchaser. The Sale by Auction is evidence of the Market Price. Being of this opinion, it is unnecessary for me to enter into a consideration of the Evidence as to the inadequacy or adequacy of the Price. It is said, that pretended Sales by Auction may be used to cover private Bargains; where such Cases occur they will operate nothing.

Bill dismissed with Costs.

EDWARDS v. FIDEL and others.

FARMER EDWARDS (deceased), held six Copyhold Estates for Lives, under the *Dean and Chapter of Winchester*, Lords of the Manor of Honiton, in the County of Wilts. Of three of these Copyholds, he procured Grants in Reversion. One of these Reversionary Grants was taken in the Name of the Plaintiff *Edward Edwards*, a Nephew of *Farmer Edwards*; another was taken in the Name of the Defendant *Michael Edwards*, who was also a Nephew of *Farmer Edwards*; and the third was taken in the Name of *James Edwards*, who was likewise a Nephew.

As to the other three Copyholds, *Farmer Edwards* agreed for Grants in Reversion:—As to one, for the life of *Farmer Edwards* the younger, a Great Nephew of *Farmer Edwards*; as to another, for the lives of *John* and *James Edwards*, who were also Great Nephews; and the third, for the lives of *Mary Edwards*, a Great Niece, and *Ann Scott*. *Farmer Edwards* died without Issue, leaving five Nephews and five Great Nephews and Nieces, Sons and Daughters of *John Edwards* deceased. The Agreements for the renewal of the three last Copyholds were completed by *James Edwards*, the Brother and Administrator of *Farmer Edwards*.

James Edwards surrendered the three last Copyholds to the use of his Will, and devised the same to his two Sons *Thomas Edwards* and the Plaintiff, and appointed the Defendants, *Fidel* and *Crowdy*, his Executors.

30th May.
*The Custom of
 a Manor was,
 that if a Tenant
 for Life of a
 Copyhold obtains
 a Grant in
 Reversion, in
 the Name of a
 third Person,
 such Person is
 entitled bene-
 ficially, unless a
 Trust is men-
 tioned on the
 Rolls of the
 Manor. Held,
 the Custom was
 reasonable, and
 that the Persons
 who were named
 in the Rever-
 sionary Grants
 of the Copyholds
 were not Trus-
 tees, but bene-
 ficially entitled.*

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and another.

This Bill was filed by *Edward Edwards*, a Residuary Legatee under the Will of *James Edwards* deceased, the Brother and Administrator of *Farmer Edwards*, against *Fidell* and *Crowdy*, the Executors of *James Edwards*; and also against the Nominees in the before mentioned Reversionary Grants of the Copyholds, *praying* that such Nominees might be declared Trustees for the Plaintiff.

On the part of the Great Nephews and Nieces (except *Farmer Edwards* the Younger), evidence was adduced of declarations of *Thomas Edwards* deceased, the Agent of *Farmer Edwards* deceased, to several Persons, that *Farmer Edwards* inserted the Names of the Children of *John Edwards* in the Grants, in order that they might have the benefit of the Grants; that *Farmer Edwards* would take care of them because they were friendless Children; and that *Farmer Edwards* had intended to make a Will, declaring that the Names of the Children were inserted in the Grants for their own benefit.

There was evidence on behalf of *Farmer Edwards* the Younger, that *Farmer Edwards* deceased, on the birth of *Farmer Edwards* the Younger, said, "Call the Boy after me, and I will do something for him." There was evidence also, that *Farmer Edwards* deceased had been heard by two Persons to say, that he put the Life of *Farmer Edwards* the Younger into the Estate, that he might have it after his death.

There was also Evidence of a Custom in the Manor, by which after the death of the Tenant in Possession of an Estate holden of the Manor for Lives, the next Life in Reversion for which the Estate was holden

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should be admitted to enjoy the same Estate for his or her own use and benefit in succession, upon the death of the Tenant in Possession leaving no Widow, unless it should appear by the Court Rolls of the Manor that a Trust was intended, by which the next Life in succession should be admitted to enjoy the Estate for his or her own benefit upon the death of the Widow of the Tenant in Possession, such Widow being by the Custom of the Manor entitled to hold the Estate for her Life before the next Life in Reversion.

1818.

EDWARDS
v.
FIDEL
and another.

Mr. Agar, and Mr. Parker, for the Plaintiffs.

Sir A. Pigott, and Mr. Sedgden, for the Defendant.

The VICE-CHANCELLOR:—

The Evidence, except what regards the Custom of the Manor, is too slight to be depended upon; but the Evidence as to the Custom weighs materially in favour of the Defendants, the Nominees of these Reversionary Estates. It is a reasonable Custom; it prevents disputes as to secret Trusts. The existence of the Custom ought properly to be tried on an Issue at Law; but as the Parties desire it, let it be referred to the Master to ascertain whether, by the Custom of this Manor, a Nominee in Reversion takes in any, and what Cases, beneficially.

1818.

LYNDON v. LYNDON.

30th May.

*An undertaking
to speed a Cause,
signed by Counsel
and left at the
Register's Office
on the same day
a Motion to
dismiss was made,
held sufficient.*

A MOTION was made, on the 17th April, to dismiss the Bill, and the Order was made. On the same day the Plaintiff left at the Register's Office, with the Register of that day, a Motion Paper, signed by Counsel, undertaking to speed the Cause. The Plaintiff called upon the Defendant's Attorney to state the circumstances, but not being at Chambers, he left a Message.

The Defendant insisted upon the Order he had obtained to dismiss the Bill.

Mr. Roupell now moved, upon an Affidavit of the Circumstances, that the Order to dismiss might be discharged.

The Vice-Chancellor said, the Order to dismiss must be discharged, and with Costs, if the Message was delivered to the Solicitor before the Order was drawn up; as to which fact Mr. Roupell had liberty to file an additional Affidavit.

1818.*Ex parte PADDY in re DRAKELEY.*

1st, 9th June.

*A Commission
may be taken out
by an Executor
before he has
obtained Probate.*

THIS was a Petition to supersede the Commission on several grounds, one of which was, that the Petitioning Creditor took out the Commission on the 1st March 1817, as the Executor of one Smith, before he obtained Probate. Probate was afterwards obtained on the 5th March 1817, and the Adjudication of the Bankruptcy was on the 8th March following.

Mr. Heald, for the Petitioner.

Mr. Hart, and Mr. Roots, contra, cited *Rogers v. James* (a).

The VICE-CHANCELLOR:—

This objection cannot be maintained. The principle in *Rogers v. James* applies to this Case.

(a) 2 Marshall 425.

1818.

POSTLETHWAITE v. BLYTHE and others.

6th June.

An Estate was conveyed to Trustees, upon Trust, amongst other things, to pay a Debt due to P— P. filed a Bill against the Trustees for Payment of his Debt, stating it to be of such an Amount.

The Trustees disputed the Amount of the Debt due.

On Payment into Court of the Sum claimed by P., and of a further Sum as a Security for P's Costs, and undertaking immediately to go to an Account, P. was directed to release the mortgaged Premises, and give up his Securities.

CERTAIN Estates in Jamaica, of considerable value, were assigned to Trustees, upon Trust, amongst other things, to pay a Debt owing to the Plaintiff. The Plaintiff filed a Bill against the Defendants, the Trustees, for the payment of this Debt. The Defendants, by their Answer, disputed the amount of the Plaintiff's Claim, insisting that a much less Sum was due. On Motion, a Sum of 2,661 l. 2s. 3d., admitted by the Trustees Answer to be in their hands, had been ordered to be paid into Court.

A Motion was now made by the Defendants, that they might be at liberty, within a month, to pay into Court the Sum of 4,034 l. 11 s., which, with the Sum already paid in, would amount to the Sum of 6,695 l. 14 s., being the utmost amount of the Balance claimed by the Plaintiff; and that upon such Payment, the Plaintiff, and all other Persons in the Pleadings mentioned, interested in the mortgaged Estates, might release and discharge the same, and re-convey the same to the Defendants (the Release and Conveyance to be settled by the Master, in case of dispute), and that the Plaintiff might deliver up, on oath, to the Trustees, all Deeds, Papers and

A Motion, however, was afterwards made before the Lord Chancellor to discharge this Order, and he discharged it.

Writings, in his Custody or Power, relating to the mortgaged Estates.

Mr. Solicitor General, and Mr. Maddock, in support of the Motion:—

Mr. Heald, contra:—

There is no instance of a Defendant being ordered to re-convey a mortgaged Estate, until he has received his Money. Here the Money will be in the hands of the Court, and locked up, until a long Account is taken, and the Defendants will not use the same diligence in prosecuting the Accounts as they would have done if the Estate had not been conveyed to them.

The VICE-CHANCELLOR:—

The Motion is reasonable. All that is claimed by the Plaintiff is to be paid into Court, and the Plaintiff will have the security of the actual deposit of the Debt in the place of the Security of the Estate. The Plaintiff does not object that the Sum paid into Court can in any event be insufficient for his Security. It is suggested only that the Defendants, having obtained the Estate, may be guilty of vexatious delay. The Plaintiff will find full authority in the Court to protect him in this respect. The Defendant must, however, in addition, pay into Court a sufficient sum of Money, as a Security for the Plaintiff's Costs, in case he shall be ultimately found entitled to them, and also undertake to go to an Account immediately.

Mr. Maddock:—

We have no objection to the additional terms mentioned by your Honor.

The VICE-CHANCELLOR:—

Take the Order on those Terms.

1818.

POSTLE-
THWAITE
v.
BLYTHE
and others.

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1818.

POSTLE-
THWAITE
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and others.

A Motion was afterwards made before the *Lord Chancellor*, to discharge the Order made by the *Vice-Chancellor*, and his Lordship discharged it, observing, that a Mortgagee could never be compelled to give up his Security, until he had his Money in his Pocket.

SKINNER v. SWEET.

9th June.

IT appeared in this Cause, that the Executrix, in respect of her Receipts as such, was considerably indebted to the Estate, and that she had an Annuity of 250*l.* given to her by the Will. The *Vice-Chancellor* directed, that her Annuity, as it became due, should be applied in payment of the Debt due to the Estate, with liberty to apply to the Court when the Debt due to the Estate should be discharged.

A Question then arose as to the Payment of the Costs of her Solicitor; and the *Vice-Chancellor* made a Declaration, that the Solicitor had a lien for his taxed Costs, upon any Payment of the Annuity to which the Executrix might be entitled, after Payment of what was due by her to the Estate.

Mr. Roupell, for Plaintiff:—

Mr. Wingfield, for Defendant:—

1818.

LEVY v. LEVY.

18th June.

THE Plaintiff, a Devisee, sought by his Bill, the establishment of the Will. The Defendant, the Heir at Law, was an Infant, and insisted the Testator was insane when he made the Will. From the Evidence adduced in the Cause, it was clear the Testator was not insane. When the Cause came on, Mr. Lovat, the Defendant's Counsel, said, he felt that the Evidence clearly established the Sanity of the Testator, and that an Issue would be an useless Expence; but he felt a difficulty, as it was the Case of an Infant, to take upon himself the responsibility of declining an Issue

*Where the Bill
was to establish
a Will, and
the Infant Heir
set up Insanity
in the Testator,
but the Evidence
in the Cause
clearly proved
him Insane, the
Counsel for the
Infant act pro-
perly in declining
an Issue.*

The VICE-CHANCELLOR:—

An Heir is in these Cases entitled to an Issue, *Devisavit vel non*; the Court cannot refuse it if asked for; but if the Counsel for the Infant Heir is clear, from the Evidence, that there is no ground to impeach the Will, he is well justified in declining to ask for an Issue.

1818.

ANONYMOUS.

19th June.

THE *Master* having certified generally, that the Examination was impertinent, the *Vice-Chancellor*, on Motion, referred it back to the *Master* to review his Certificate, and state in what respects he considered the same as impertinent.

NEWCOMBE v. RAWLINGS.

19th June.

THE Defendant obtained two Orders for time to answer, which expired; he then applied, by Petition at the *Rolls*, for a third Order for time. After the Petition was answered, but before the Order was drawn up, or any notice of the Petition was given to the Plaintiff, an Attachment issued, which was now sought to be set aside.

Mr. Wilbraham, in Support of the Motion :—

Mr. Pemberton, *contra* :—

The *Vice-Chancellor*, after consulting the Registrar, (Mr. Croft), said, a Copy of the Petition ought to have been served on the Plaintiff; and refused the Motion, with Costs.

1818.

Original Bill:—Between THOMAS WALKER, Plaintiff; and JAMES BARNES, Defendant.

Bill of Revivor:—Between THOMAS WALKER, Jun. RICHARD GARLICK, and HENRY HUGHES, Executors of the said original Plaintiff THOMAS WALKER, Plaintiffs;

And

The said JAMES BARNES Defendant.

22d June.

THE Defendant Barnes, pretending to be seised in Fee of a Wharf at *Brigbrook*, on the 18th January 1809, agreed to sell the same to the Plaintiff for 650*l.*, and by Indentures of Lease and Release, 4th and 5th Sept. 1809, conveyed the Wharf to the Plaintiff, his Heirs and Assigns for ever.

The Vendor of an Estate having lost his Title Deeds, agreed to give the Vendee a Real Security against such loss.

The Vendee, on a Bill for a specific performance of the Agreement, stated he had not Real Property sufficient for such Security, but offered ample Personal Security.

Held, Vendor was bound to procure a sufficient Real Security.

At the time the Purchase Money was paid, the Defendant alleged that the Conveyance to him of the Wharf and Premises, as well as the Title Deeds, were mislaid, and could not be found; and thereupon a Bond of Indemnity, dated the 5th Sept. 1809, was entered into by the Defendant, in the penalty of 1,300*l.*, in order to save harmless the Plaintiff; and it was agreed that in the mean time, and until the Conveyance and Title Deeds of the Wharf could be found, the Sum of 650*l.* should be placed in the hands of *Phillip Box of Buckingham*, Banker, since deceased, in Trust for the Plaintiff.

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BARNES.

On the 5th Sept. 1809, the Plaintiff deposited the Purchase Money in the hands of *Phillip Box*, who gave a Receipt for the same, wherein it was stated, that the Money had been lodged with him by the mutual directions of the Plaintiff and Defendant, there to remain as an indemnity for the Plaintiff, against all Persons whomsoever who may set up any claim to the Premises, in anywise howsoever, in consequence of the Conveyance thereof to the Defendant being lost or mislaid, or not delivered up to the Plaintiff, or until the Defendant should give a Real Security of double the value for such Indemnity, which Real Security was to be given within six months from the date of the Receipt, if the Deeds were not then found, and may be changed from time to time, at the will of the Defendant, for any other of equal value; and in the mean time the said *Phillip Box* agreed to pay to the Defendant interest on the said 650*l.* at four per-cent.; and both the Plaintiff and Defendant signed their consent thereto at the foot of the Receipt, which was deposited with a third Person, with the consent and on the behalf of all Parties.

Upwards of five years elapsed since the Purchase Money was paid into the hands of *Box*, who died in 1811, and the Purchase Money continued in the hands of his Executors, who were willing to pay the same as the Plaintiff and Defendant should mutually direct.

The Plaintiff by his Bill, stating these facts, *prayed*, That the Defendant might be decreed specifically to perform his Agreement, and to deliver up the Conveyance to him of the Wharf, and the Title Deeds relating thereto; or, in case the same could not be found, that

the Defendant might be decreed to give to the Plaintiff a full and sufficient Security, charged upon Real Estates of the Defendant, until the same could be found.

The Defendant by his Answer admitted the statements in the Bill;—stated his endeavours to recover the lost Deeds; his readiness to give a full and complete indemnity; but his inability to give a Real Security, he not being seised or possessed of sufficient Freehold Estates for that purpose; and insisted, that a Security in Personal Estates of equal value with the Wharf, ought to be received.

After the original Bill was instituted the Plaintiff died, and a Bill of Revivor was filed by his Executors.

Sir *Samuel Romilly*, for the Plaintiffs, contended that the Defendant was bound to give a Real Security, and that if he had no Estates, he must, for that purpose, purchase some.

Mr. *Hart*, and Mr. *Raithby*, for the Defendants, insisted, that as the Defendant had no Real Estate, he could not perform his Agreement, and that the Plaintiffs ought to be satisfied with Personal Security. They cited *Howell v. George* (a).

The VICE-CHANCELLOR:—

If a man agrees to give a Real Security for a demand, he may be obliged specifically to perform his Agreement, though he has no Real Estate, because he may procure it. It might be different where he agrees to give a Security on an Estate called *A*, of which he is not

(a) *Ante*, 1 vol. p. 1.

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the owner, because he may be unable to procure that very Estate; but where, as in this case, he agrees to give a Real Security, generally, he has all the world before him, and must therefore purchase an Estate to enable him to perform his Agreement. In the common case of a Husband, on Marriage, covenanting to settle a Real Estate of a particular value on his Wife and the Issue of the Marriage, if the Husband has no Real Estate to settle, he is compellable to procure one.

Specific Performance decreed, with Costs
of Original Bill, but not the Costs of
the Bill of Revivor.

1818.

Between *George Gillespie*, Executor of *Lewis Crawford*,
deceased - - - - Plaintiff,
And
James Matthew Hamilton - - - - Defendant.

24th June.

IN December 1815, *Lewis Crawford* (since deceased) entered into an Agreement for a Partnership with the *for a term of years, is dissolved by the death of a Partner before the Term has expired.* Defendant, in the business of supplying Mines in *Cornwall* with Timber, Iron, and other Articles, which business the Defendant had before carried on upon his own account, and he was then possessed of the Good Will of the Trade, and also of a quantity of Timber and other Articles, for the purpose of such Business. The Articles of Agreement for the Partnership, dated 19th December 1815, were as follow:—"Articles of Agreement made and entered into between *James Matthew Hamilton* and *Lewis Crawford*, for the Trade or Business, as usually carried on by the former in the Village of *Charlestown* and its vicinity, witnesseth; First, That the Business shall be carried on under the name of *James Matthew Hamilton*, and that the Parties shall be each one half concerned in the Profit or Loss arising thereon:—Second, That the Partnership shall commence on the 1st day of January next:—Third, That all Articles of every description requisite for the Trade, that are now on hand, are in the Warehouses or elsewhere belonging to *James Matthew Hamilton*, are to be taken to account at what they cost, delivered at such places:—Fourth, That the Stock for carrying on

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the Business, is to be furnished in the following manner; viz. 4,000*l.* to be furnished by *Lewis Crawford*, and 4,000*l.* by *James Matthew Hamilton*, 2,000*l.* of which is to be lent him by *Lewis Crawford* without Interest, as one half of his Share of Stock, and as an equivalent for his Services, he having the whole of the business to transact, with the assistance of Clerks, as he may deem necessary, who are to be paid by the Concern:—Fifth, That this Partnership shall continue for three years, that is, that it shall end on the 1st day of January 1819, and that a regular statement of Profit or Loss shall be delivered to *Lewis Crawford* every three months during the existence of the Partnership:—Sixth, That the Profits arising on the Business shall be divided yearly, unless deemed necessary by both the Parties to be employed for the good of the Concern:—Seventh, That 3,000*l.* of the Stock to be furnished by *Lewis Crawford*, shall be put into the Concern the 1st day of January next, when this Partnership commences, and the other 3,000*l.* mentioned in the fourth Article to this Agreement, on the 1st day of January 1817.” Pursuant to the Articles of Agreement, 3,000*l.*, part of the Capital to be advanced by *Lewis Crawford*, was paid to the Defendant; and this was the only Money advanced by either of the Parties to the Concern, and did not exceed the value of the Stock and Capital brought into the Trade by the Defendant.

Within a few weeks after the commencement of the Partnership, viz. 27th January 1816, *Lewis Crawford* died, having by his Will, 24th January 1816, appointed the Plaintiff his Executor, who proved his Will.

Before *Lewis Crawford's* death, the Defendant carried on the Business with the Stock, and made some gains; and to extend the Partnership Business, laid out part of the Money advanced by *Crawford*, in Mines or shares of Mining Concerns, and purchased goods and articles on account of the Partnership, and received and paid Money on account of the Partnership, and fitted up a house to carry on Banking business.

1818.

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HAMILTON.

The Plaintiff, to avoid entering into an account of the Stock and Effects, proposed to the Defendant to pay 3,000*l.* and wave all accounts, and relinquish all further demands; and the Defendant, with a view to an amicable adjustment, offered to consider the Partnership as dissolved by the death of *Crawford*, and proposed to pay back the 3,000*l.* by instalments, 1,000*l.* at two years and a half from the commencement of the Partnership, and the remainder at three years and a half; which proposal was refused.

Under these circumstances, the Plaintiff, by his Bill, prayed an account of the Money advanced by *Lewis Crawford*, and repayment of the same, with Interest; and an account of the Partnership dealings before and after the death of *Lewis Crawford*, and payment of what should be found due, and for an Injunction to restrain the Defendant from carrying on Trade with the Stock, Monies and Effects of the Co-partnership, or making use of the same in any Trade or Business, and from possessing or getting in any part of the Partnership Stock, Property and Effects, and that a Receiver might be appointed to get in the Partnership Property and Effects, and wind up the Concerns.

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HAMILTON.

The Defendant, by his Answer, admitted the foregoing facts, but submitted, whether, as it was stipulated by the Agreement, that the Partnership should continue until the 1st January 1819, it was to be considered as dissolved by the death of *Crawford*, or ought not to be carried on until the expiration of that period, for the joint benefit of the Defendant, and the Estate of *Crawford*.

On 16th July 1817, an Order, on Motion, was made for the appointment of a Receiver.

The Cause now came on to be heard; and the *Vice-Chancellor* observed, that, although the Partnership is entered into for a term of years, it is previously dissolved by the death of either of the Partners, unless there be express stipulations to the contrary

1818.

WETHERELL v. COLLINS.

26th June.

THIS was a Bill by a Mortgagor for redemption of mortgaged Premises. The Mortgagee had assigned the Mortgage upon certain trusts for the benefit of his Family. The Mortgagee, the Trustees, and the *Cestuis que Trust* were all made Parties Defendants; and, upon the hearing, a question was made as to the Costs of the Trustees and *Cestuis que Trust*, which the Plaintiff urged he ought not to pay, because they were necessary Parties to the Suit, not by his act, but by the act of the Mortgagee.

Mortgagor filing a Bill to redem, must pay the Costs of Persons, Defendants, claiming under the Mortgagee.

The VICE-CHANCELLOR:—

It seems at first sight a great hardship that the Mortgagor is to pay the Costs of Persons claiming under the Mortgagee, and made necessary Parties by his act, but it is the constant course of the Court, and it is to be supported upon this principle,—that at law, after a Mortgage is forfeited, the Estate is the absolute property of the Mortgagee, and he may deal with it as his own; and that if the Mortgagor comes for the redemption which the equity of this Court gives him, it must be upon the terms of indemnifying the Mortgagee from all Costs arising out of his legal acts.

1818.

AISLABIE v. RICE.

27th June.

*Devise and
Bequest of Lands
and Furniture to
A. H. Testator's
Wife, for Life,
and after her
Death, to H. L.
and her Assigns,
for Life, in case
she continued
single and un-
married; and
after her decease,
unto such Per-
son, &c. as she
should by Deed
or Will appoint,
and for want of
appointment, to
A. L and to*

*MICHAEL HATTON, by his Will, 14th Feb. 1771,
after devising all his Estates to and for the use of *Alice
Hatton*, his Wife, for her Life, devised and bequeathed
his Estate, Manor, and Mansion House of *Dane Court*,
with all its Lands, Hereditaments and Appurtenances,
and various Articles at, in and about the same, unto
and for the use and benefit of the Plaintiff, under her
then maiden name of *Hannah Lilly*, in the following
words:—“ And as concerning the said above excepted
Manor or Lordship of *Dane Court*, with the Manor and
Mansion House called *Dane Court*, and the several
Houses, Lands and Appurtenances thereunto belong-
ing, and also my Plate, China and Furniture, Goods,
Horses, Cattle, Carriages and Husbandry Tackle, which
shall be in my said House and Appurtenances at the
time of my decease, I give, devise, and bequeath the*

*M. L. their Heirs, &c. as Tenants in Common; but in case the said H. L.
should marry in the Life-time of A. H., and with her consent, or after her
Death, with the consent of J. T. and T. L., or the Survivor (signified in
writing), then H. L. and her Assigns should enjoy the Lands and Furniture in
the same manner she would have done if she had continued single and unmarried.*

*A. H., the Testator's Wife, and also J. T. and T. L. died. H. L. took posse-
sion of the Estate, and married. Held, that H. L. took an Estate for Life, with
a power of appointment, subject as to her Life Estate only to the condition of
her remaining sole and unmarried, which was a condition subsequent; and as the
compliance with it became impossible by the act of God, her Estate for Life
became absolute, and she might execute the power of appointment.*

*Specific performance decreed against a Purchaser of the Fee from H. L., but
without Costs, a fair objection having been made to the Title.*

same, and every part thereof, unto the said *Hannah Lilly* and her Assigns, for and during the term of her natural Life, in case she shall continue single and unmarried; and from and after her decease, I give, devise, and bequeath the same Manor or Lordship of *Dane Court*, with the Manor and Mansion House called *Dane Court*, and the several Houses, Lands, and Appurtenances thereunto belonging, and also the said Plate, China, Furniture, Goods, Horses, Cattle, Carriages and Husbandry Tackle, unto such Person or Persons, and in such Shares and Proportions, and in such Manner and Form, as the said *Hannah Lilly* shall, by any Deed or Deeds, Writing or Writings, or by her last Will and Testament in Writing, signed and executed in the presence of Three or more credible Witnesses, direct, limit or appoint; and for want of such Direction, Limitation or Appointment, then I give, devise, and bequeath the same and every part thereof unto the said *Alice Lilly* and *Mary Lilly*, and their Heirs, Executors, Administrators and Assigns, to be equally divided amongst them, share and share alike, as Tenants in Common, and not as Joint Tenants. But in case the said *Hannah Lilly* shall marry in the Life-time of my said Wife, and with her consent and approbation, or, after the death of my said Wife, with the consent and approbation of *James Fierney*, of *London*, Merchant, and *Thomas Lilly*, of *London*, Merchant, or the Survivor of them, such Consent and Approbation to be signified in Writing under his, her or their hand or hands; then and in either of the said cases, as the event shall be, it is my Will and Mind, and I do hereby order and direct, that the said *Hannah Lilly* and her Assigns, shall have and enjoy the said Manor of *Dane Court*, with the Houses, Lands and Appurtenances thereunto

1818.

ATSLABIE

v.

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RICE.

belonging, and also the said Plate, China, and other Effects, in the same manner as she could have done if she had continued single and unmarried."

The Testator died in 1776, and his Will was proved on the 15th August in that year.

Alice Hatton survived the Testator, and died in December 1791. On her decease, the Plaintiff entered into Possession of the Premises at *Dane Court*, with the Appurtenances, and continued ever since to have such Possession.

James Fierney and *Thomas Lilly* died many years ago, and whilst the Plaintiff remained unmarried. In February 1795, the Plaintiff married *Rawson Aisladie*, who died in January 1806.

The Plaintiff, 10th June 1815, entered into a written Agreement with the Defendant, to sell to the Defendant her Life Estate and Interest, and to appoint all and singular the Hereditaments and Premises to the Defendant, or as he should direct in Fee Simple, for the price of 11,000*l.*

The Defendant objecting to the Title, this Bill was filed, for a specific performance of the Agreement.

The Defendant, by his Answer, submitted, whether the power of Limitation and Appointment given to the Plaintiff under the Will, was to be considered as a Springing Use, or an Executory Devise, or partaking of the nature thereof, or otherwise as a mere power to appoint by way of a strict contingent Remainder, and

how far the power to appoint, given by the Will, under whatever denomination it might be classed, became an absolute vested Right, or enabled the Plaintiff to execute the same by way of a Remainder immediately expectant in her Life-time; and whether the particular Estate for Life of the Plaintiff did not determine, in point of Law, by her marriage without the consent in writing of the several Persons in the Will and Bill named; and if it did so determine, whether the Plaintiff's Power of Appointment was or was not destroyed thereby, as in strictness thereupon dependant.

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RICK.

The Cause came on to be heard before *His Honor* the late *Master of the Rolls* (a), 31st May 1816, who directed a Case should be made for the opinion of the Court of *Common Pleas*, and the question was to be—what Estate, Right, and Interest the Plaintiff took in the Real Estates at *Dane Court* under the Will of *Michael Hatton*, and what Estate, Right, and Interest she then had therein?—And *His Honor* reserved the consideration of all further directions, and of the Costs, till after the Judges had made their Certificate.

The Case was in consequence, twice argued before the Court of *Common Pleas*, and the Judges returned the following Certificate:—“ We have heard this Case argued, and have considered it. We are of opinion, that *Hannah Lilly*, now *Hannah Aislabie*, took under the above Will, an Estate for Life, with a Power of Appointment unto such Person or Persons, and in such Shares and Proportions, and in such Manner and Form, as she should by any Deed or Deeds, Writing or Writ-

(a) Sir Wm. Grant.

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ings, or by her last Will in Writing, signed and executed in the presence of three or more credible Witnesses, direct, limit and appoint; subject nevertheless as, to her Life Estate only, to the condition of her remaining sole and unmarried, which condition was qualified by the proviso, that a marriage with the consent and approbation of *Alice Hatton*, the Wife of the Devisor, in her Life-time, or after her Death, of *James Fierney* and *Thomas Lilly*, signified in the manner expressed in the said Will, should not determine her Life Estate.

" We are of opinion, that this condition was a condition subsequent; and that as the compliance with it was by the death of *Alice Hatton*, and *James Fierney* and *Thomas Lilly*, before the marriage of *Hannah Lilly*, become impossible, by the act of God, her Estate for Life is become absolute; and that she may now execute the Power of Appointment of the Real Estates at *Dane Court*, in the Manner and Form directed by the above Will.

" V. GIBBS,
" R. DALLAS,
" J.A. PARK,
" J. BURROUGH."

The Cause now came on for further directions, and upon the production of this Certificate, the Vice-Chancellor directed a specific performance of the Agreement.

It was then urged, that the Purchaser ought to pay the Costs of the Suit, his objections to the Title not being sustained; but the Vice-Chancellor said, wherever

there was a fair objection to a Title, a Purchaser, though he fails in his objection, being justified in taking the opinion of the Court upon it, ought not to pay Costs. The Decree therefore was for the Plaintiff, but without Costs.

1818.

AISLADIE

T.

RICE.

TOWNSHEND and another v. WILSON.

29th June.

ON the hearing of this Cause, 20th January 1818, a Case was directed by the Vice-Chancellor for the opinion of the Court of Kings Bench, the point being, whether the Power of Sale was well executed by the surviving Trustees? The Case, as stated for the opinion of the Court, was as follows:—"By Indentures of Lease and Release, bearing date respectively the 10th and 11th days of October 1782, the Release made between the Rev. Osmond Beauvoir, D. D. of the first part; *Mary Sharpe*, Spinster, of the second part; the Right hon. Sir *William Lynch*, Knt., Sir *Charles Gould*, Knt., and *Thomas Edward Freeman*, Esquire, of the third part; (being the Settlement made previously to and in contemplation of a Marriage then intended between the said *Osmond Beauvoir* and *Mary Sharpe*), she, the said *Mary Sharpe* granted, released, and confirmed unto the said Sir *William Lynch*, Sir *Charles Gould*, and *Thomas Edward Freeman*, and their Heirs, all that the Reversion or Remainder in Fee Simple of her the said *Mary Sharpe*, expectant upon, and to take effect in possession immediately after the decease of *Joshua Sharpe*, in the

A Power of Sale given to three Trustees, held not to be well executed by two surviving Trustees.

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said Indenture named, of and in the several Lands and Hereditaments situate at *East Barnet*, in the County of *Hertford*, to hold the same unto the said Sir *William Lynch*, Sir *Charles Gould*, and *T. E. Freeman*, their Heirs and Assigns, to the several uses following, (that is to say): To the use of the said *Mary Sharpe* and her Heirs until the Marriage, and after the solemnization thereof, to the use of the said *Osmond Beauvoir*, and his Assigns, for the term of his natural life, without impeachment of Waste; with remainder to the use of the said Sir *William Lynch*, Sir *Charles Gould*, and *Thomas Edward Freeman*, and their Heirs, during the life of the said *Osmond Beauvoir*, in trust, to preserve the contingent Remainders thereafter limited; with remainder to the use of the said *Mary Sharpe*, and her Assigns, for the term of her life, without impeachment of Waste; with remainder to the same Trustees, and their Heirs, during her life, to preserve contingent Remainders; with remainder to the Children of the Marriage in Tail Male; with the ultimate remainder to the right Heirs of the said *Mary Sharpe*. And in the said Indenture of Release were contained Powers and Covenants in the words following, viz.:—

“ Provided always, and it is hereby agreed and declared, that it shall and may be lawful for the said Sir *William Lynch*, Sir *Charles Gould*, and *Thomas Edward Freeman*, and their Heirs, after the solemnization of the said intended Marriage, from time to time, by and with the consent, good liking, and approbation of the said *Osmond Beauvoir*, and *Mary Sharpe*, his intended Wife, during their joint Lives, or of the Survivor of them after the decease of either of them, to be testified by some Deed or Instrument, to be sealed

and delivered by them respectively, in the presence of and to be attested by two or more credible Witnesses, to make sale and dispose of, or convey in exchange, for or in lieu of other Messuages, Lands, Tenements, or Hereditaments to be situate somewhere in that part of *Great Britain* called *England*, all and singular the said Messuages, Lands, Tenements, Hereditaments, Moieties, and Parts and Shares, and Premises hereinbefore granted and released, or any Part or Parcel thereof, with their and every of their Appurtenances, unto any Person or Persons whomsoever, for such Price or Prices in Money, or for such other equivalent in Messuages, Lands, Tenements, or Hereditaments as to the said Sir *William Lynch*, Sir *Charles Gould*, and *Thomas E. Freeman*, or their Heirs, shall with such consent, good liking and approbation as aforesaid, seem meet and reasonable; and for that end and purpose, for them, the said Sir *William Lynch*, Sir *Charles Gould*, and *T. E. Freeman*, and their Heirs, by and with such consent, good liking and approbation as aforesaid, by any Deed or Deeds, Writing or Writings, to be by them sealed and delivered in the presence of, and attested by two or more credible Witnesses, to revoke, determine, and make void all and every the Uses, Estates, Trusts, Powers, Provisoes, and Limitations hereinbefore limited, created, and declared of and concerning the Hereditaments and Premises hereinbefore, by these presents, granted and released, and which shall be sold, disposed of or conveyed in Exchange. And by the same or any other Deed or Deeds, Writing or Writings, to be sealed and delivered as aforesaid, to limit and appoint the said Hereditaments and Premises whereof the Uses shall be so revoked, either unto such Purchaser or Purchasers, or to the Person or Persons

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making such Exchange or Exchanges, and his and their Heirs; or otherwise to limit, create, declare, and appoint such new or other Use or Uses, Trust or Trusts, of and concerning the same Hereditaments and Premises, the Uses whereof shall be so revoked, as shall be necessary for the executing, effecting, and completing such Sale and Disposition. And it is hereby declared and agreed by and between the said Parties to these presents, that the Monies arising by such Sale or Sales shall be paid into the hands of them the said Sir *William Lynch*, Sir *Charles Gould*, and *Thomas E. Freeman*, or the Survivor or Survivors of them, or the Executors, Administrators, or Assigns of such Survivor, and they and he are and is hereby accordingly authorized and empowered to receive the same, and every Part or Parcel thereof. And also upon the receipt of the Monies arising by such Sale or Sales of the said Hereditaments and Premises, or any Part or Parcel thereof, where any of the said Hereditaments and Premises shall be sold for a valuable consideration in Money, to give and sign Receipts for the Money for which the same Premises shall be so sold; which Receipts shall be sufficient discharges to any Purchaser or Purchasers for the Purchase Money for which the same shall be so sold, or for so much thereof as in such Receipts shall be acknowledged or expressed to be received; and such Purchaser or Purchasers shall not afterwards be answerable or accountable for any loss, misapplication, or non-application of such Purchase Money. And when any of the said Hereditaments and Premises shall be so sold for a valuable consideration in Money, and such Receipts shall be given for the Purchase Money as aforesaid; and also when any of the said Hereditaments and Premises shall be so sold,

disposed of, or conveyed in exchange for or in lieu of any other such Messuages, Lands, or Hereditaments as aforesaid, and the Fee Simple and Inheritance of such last mentioned Messuages, Lands, and Hereditaments shall be vested in the said Sir *William Lynch*, Sir *Charles Gould*, and *Thomas Edward Freeman*, and their Heirs; all and every the Messuages, Lands, Tenements, Hereditaments and Premises so sold or disposed of, or conveyed in exchange, shall be, and remain for ever thenceforth, freed and absolutely discharged of and from all and singular the Uses, Estates, Trusts, Declarations, and Agreements in and by these presents limited, expressed, and declared touching and concerning the same, from and after the solemnization of the said intended Marriage as aforesaid.

" Provided always, and it is hereby further declared and agreed, by and between all the said Parties hereto, that in case any of them, the said Sir *William Lynch*, Sir *Charles Gould*, and *T. E. Freeman*, shall happen to die during the continuance of the said Trust, or shall desire to relinquish, or be discharged therefrom, then, and in either of the said Cases, it shall and may be lawful to and for the said *Osmond Beauvoir* and *Mary Sharpe*, jointly, during their joint lives, or the Survivor of them, during his or her life, and after the decease of the Survivor of them, to and for the Executors or Administrators of the said *Mary Sharpe*, by writing under his, her, or their hands respectively, and attested by two or more credible Witnesses, to nominate and appoint some other fit and proper Person to be and stand a Trustee in the place, room, or stead of such of them, the said Trustees, Parties hereto, as shall so relinquish, or be discharged from, or die during the continuance of the

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said Trusts; and so from time to time, as often as any Trustee of or in the said Trust Premises shall happen to die, or relinquish, or be discharged as aforesaid, during the continuance of the said Trusts, such nomination and appointment of a new Trustee, in the place or stead of him so dying, or being discharged, shall or may, in manner as aforesaid, from time to time be made. And it is hereby declared and agreed by and between all the said Parties hereto, that immediately after every such nomination and appointment of a new Trustee shall be so made, all such Transfers, Assignments, Conveyances, Acts, Deeds, Matters, and Things whatsoever, shall be executed, made, done, and performed by the surviving or other Trustees or Trustee remaining in the Trust, and by such interested Parties as may be necessary or requisite in that behalf, for conveying, assigning, transferring, making over, and vesting the Trust Stocks, Monies and other the Trust Premises, so and in such manner, and by such ways and means as that the same may be fully, equally, and effectually vested in such new Trustees or new Trustees, jointly or together, with the surviving or other remaining Trustees or Trustee, upon the same Trusts, and to and for the same ends, intents, and purposes, and under and subject to the same Powers, Provisions, Declarations, and Agreements as are hereinbefore mentioned, expressed, provided, and declared of and concerning the said Trust, Capital Sums, or Stocks so now vested in them the said Trustees, Parties hereto, and other the Trust Premises respectively as aforesaid, or as near thereunto as the deaths of Parties or other circumstances will then admit of.

“ And the said *Osmond Beauvoir* doth, for himself, his Heirs, Executors and Administrators, and for every of

them, covenant, promise, and agree to and with the said Sir *William Lynch*, Sir *Charles Gould*, and T. E. *Freeman*, their Executors, Administrators, and Assigns, by these presents, in manner and form following (that is to say):—That as well the said several Trust Capital Sums or Stocks so transferred to, and now vested in the said Trustees; and also the said Leasehold Premises hereinbefore assigned, or agreed to be assigned; and likewise the said Freehold Premises hereinbefore released and conveyed; and also the said Copyhold Premises so covenanted to be surrendered as aforesaid, and each and every of them; and all and singular the said Trust Premises respectively, shall be vested, and be, remain, and continue vested in them, the said Trustees for the time being; and shall and may be lawfully and peaceably, and quietly had, held, and enjoyed by them, to the several Uses, upon the several Trusts, and to and for the several intents and purposes, and under and subject to the several Powers, Provisoes, Declarations, and Agreements hereinbefore mentioned, expressed, and declared of and concerning the several Trust Premises respectively, without any the lawful let, suit, trouble, molestation, interruption, denial, disturbance, Claim or Demand whatsoever, of or by the said *Osmond Beauvoir*, his Heirs, Executors, Administrators, or Assigns, or of or by any other Person or Persons whosoever claiming, or to claim by, from, or under, or in Trust for him or them, or any or either of them, or by, with, or through his, their, or any of their acts, means, consent, privity, or procurement in anywise howsoever. And also that he the said *Osmond Beauvoir*, and his Heirs, Executors, Administrators, and Assigns, and all and every other Person and Persons whosoever, having or lawfully claiming any Estate, Right, Title, Property,

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or Interest of, into, from, or out of, as well the said Trust Capital Sums, or Stocks and Monies so vested in the said Trustees, as the said Leasehold Premises hereinbefore assigned, or agreed to be assigned; and also the said Freehold Premises hereby granted and released; and the said Copyhold Premises so covenanted to be surrendered as aforesaid, or any or either of them, or any part or parcel thereof respectively, from, by, or under him the said *Osmond Beauvoir*, shall and will from time to time, and at all times after the solemnization of the said intended Marriage, at the request of the said Sir *William Lynch*, Sir *Charles Gould*, and *Thomas E. Freeman*, or the Survivors or Survivor of them, or the Executors, Administrators, or Assigns of such Survivor, but at the proper Costs and Charges of the said *Osmond Beauvoir*, his Heirs, Executors, Administrators or Assigns, make, do, acknowledge, levy, suffer and execute, or join, or cause or procure to be made, done, acknowledged, levied, suffered, and executed, all and every such further and other lawful and reasonable act and acts, thing and things, Deeds and Devises, Conveyances, Transfers, Assignments, Surrenders, and Assurances whatsoever, as well for the further, better, more perfect and absolute assigning and transferring the said Trust Capital Sums or Stocks, Monies, Leasehold Premises, and other the said Personal Estate and Effects, as for releasing, conveying, and assuring the said Freehold Hereditaments, and Premises so transferred, assigned, and conveyed respectively as aforesaid; and also for surrendering the said Copyhold Premises so covenanted by the said *Mary Sharpe* to be surrendered as aforesaid; and that pursuant and according to her Covenant in that behalf, with their and every of their

Appurtenances respectively, unto them the said Sir W. *Lynch*, Sir *Charles Gould*, and T. E. *Freeman*, and their Heirs, Executors, Administrators and Assigns, according to the natures of the said Trust Estates and Premises respectively, to the several Uses, upon the several Trusts, and to and for the several ends, intents, and purposes, and by, with, under, and subject to the several Powers, Provisoes, Declarations, and Agreements hereinbefore mentioned, expressed, provided and declared of and concerning the said Trust, Estates, and Premises respectively; and also for the better authorizing and empowering the said Trustees to perform and execute the several Trusts hereby in them reposed, as by the said Sir *William Lynch*, Sir *Charles Gould*, and T. E. *Freeman*, or their Heirs, Executors, Administrators, or Assigns, or their, his, or any of their Counsel learned in the Law, shall be reasonably devised, or advised, and required.

" Provided always, and it is hereby declared and agreed, by and between the said Parties to these presents, That the said several Trustees in and by these presents nominated and appointed, and each and every of them, their, and each and every of their Heirs, Executors, Administrators, and Assigns; or any new Trustee or Trustees to be appointed of or in the aforesaid Trust Premises, by virtue of the Power or Authority for that purpose hereinbefore contained, shall be charged and chargeable only for such Monies as they and every of them shall respectively actually receive by virtue of the Trusts hereby in them reposed. And that they or any of them shall not be answerable for, or chargeable with, any sum or sums of Money for which they shall respectively give any receipt or acquittance in writing,

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unless the same Sum and Sums shall come to the hands of such of them as shall give such receipt or acquittance; and they and each and every of them shall be charged and chargeable only for his and their own wilful neglects and defaults respectively, and not the one for the other or others of them, or for the acts, receipts, neglects, or defaults of the other or others of them, or of any Person or Persons acting under, or employed or entrusted by them, or any of them, in the receipt or payment of any part of the aforesaid Trust Monies or Effects, or of any Broker, Goldsmith, Banker, or other Person with whom, or in whose hands, any part of such Trust Monies or Effects shall or may be deposited or lodged for safe custody, or otherwise in the execution of any of the Trusts before mentioned; neither shall they the said Trustees, or any of them, be answerable, or charged, or chargeable for any loss or damage which may happen by reason of any defect of Title in any Manors, Messuages, Lands, Tenements, or Hereditaments to be purchased with any part of the said Trust Monies or Effects; or by reason of any bad, defective, or insufficient Security or Securities to be taken in pursuance of the Trusts aforesaid; or of any other loss or damage in the execution of the aforesaid Trusts, or in relation thereto, except the same shall happen by or through their wilful defaults. And that they the said several Trustees, and every of them, and their respective Heirs, Executors, Administrators, and Assigns, shall and may, by and out of the Monies which shall come to their respective hands by virtue of the Trusts aforesaid, retain to and reimburse himself and themselves respectively. And also shall and may, out of such Monies, pay and allow to his and their Co-trustee and Co-trustees all such Costs, Charges, Damages, and Expences

which they, or any of them, shall or may respectively bear, pay, sustain, or be put unto, in or about the execution of the Trusts hereby in them reposed, or any of them, or in anywise relating thereunto; the allowance of which Costs shall be regulated by the method practised between Solicitor and Client, and not as between Party and Party."

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The Marriage between the said *Osmond Beauvoir* and *Mary Sharpe* was soon afterwards solemnized. The said *Joshua Sharpe* died before the date of the next mentioned Indenture, and the said *Sir William Lynch* died in the year 1784.

By Indentures of Lease and Re-release, and Appointment, bearing date respectively the 17th and 18th days of September 1788: The Release and Appointment being made between the said *Sir Charles Gould* and *Thomas E. Freeman*, of the first part; the said Reverend *Osmond Beauvoir* and *Mary* his Wife, of the second part; and *Joon Bacon*, of the 3d part. The said *Sir C. Gould* and *Thomas E. Freeman* did, in consideration of 4,040*l.* to them paid by the said *John Bacon*, at the request, and by the direction, and with the consent and approbation of the said *Osmond Beauvoir* and *Mary* his Wife; and in execution of the said power for that purpose contained in the said hereinbefore stated Indenture of Release; and of all and every other power in them vested, bargained, sold, aliened, released, and confirmed; and the said *Osmond Beauvoir* and *Mary* his Wife granted, bargained, sold, aliened, released, ratified, and confirmed the said Premises unto and to the use of the said *John Bacon*, his Heirs and Assigns.

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The said Indenture of Release and Appointment was executed by all the Parties thereto, in the presence of, and attested by, two credible Witnesses; and the Purchase Money 4,040*l.* was paid into the hands of Sir Charles Gould and T. E. Freeman, who signed a receipt for the same.

The question for the Opinion of the Court was, Whether the said Indentures of the 17th and 18th days of September 1788, were a valid execution of the said Power of Sale.

The Case was argued on the 27th January 1818, and the Judges sent the following Certificate:

" We have heard this Case argued by Counsel, and have considered, and are of Opinion, that the said Indentures of the 17th and 18th days of September 1788, were not a valid Execution of the said Power of Sale.

" ELLENBOROUGH,
" J. BAILEY,
" C. ABBOTT,
" G. S. HOLROYD."

On the coming on of the Cause for further directions, the Plaintiff undertook to procure the concurrence of all Parties necessary to make a good Title; whereupon, a specific Performance was decreed, but payment of Costs by the Plaintiff. The Conveyance to be referred to the Master if the Parties differed, and a reservation as to future Costs.

1816.

Ex parte THORLEY, in re ROBERTS.

THIS was a Petition by *Thorley*, that he might be discharged from being Assignee under the Commission against *Roberts*.

Mr. Montagu, for the Petitioner.

The Vice-Chancellor made the Order as follows:—
 “ I do order that a meeting of the Commissioners named in the said Commission, or the major part of them, be forthwith held, of which due notice is to be given and published in *The London Gazette*; and that the Petitioner *Nathaniel Thorley* be discharged and removed from being the Assignee of the Estate and Effects of the said *William James Roberts*; and that at such Meeting the said Commissioners do proceed to the choice of one or more Person or Persons to be an Assignee or Assignees of the Estate and Effects of the said *W. J. Roberts*, in the room and stead of the said *Nathaniel Thorley*; and the Creditors of the said *W. J. Roberts*, who shall be present at such Meeting, are to proceed to such choice accordingly. And I do order that, after such choice be made, the said *N. Thorley*, and all other proper Parties, do join with the said Commissioners in making and executing a new Assignment and Conveyance of the Estate and Effects of the said *W. J. Roberts* to the Person or Persons who at such Meeting shall be chosen the new Assignee or Assignees as aforesaid; and that the said *N. Thorley* do release to them all his Right, Title and Interest, of, in, and to the said Estate and Effects of the said *W. J. Roberts*; and that the said *N. Thorley* do come to an account

2d June.
Assignee discharged from being such on his own Petition, but on terms.

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before the said Commissioners for the Estate and Effects of the said *W. J. Roberts*, come to the hands of said *N. Thorley*, or to the hands of any other Person or Persons by his order, or for his use as Assignee, under the said Commission; and for the better taking the said Account, the said *N. Thorley* and all other proper Parties are to be severally examined before the said Commissioners, upon Interrogatories or otherwise, touching the matters in question, as they shall think fit; and do produce before the said Commissioners, upon oath, all Books of Accounts, Papers and Writings in his custody or power relative thereto, as the said Commissioners shall direct. And I do order that the said *N. Thorley* do deliver over to the new Assignee or Assignees so to be chosen as aforesaid, all such part of the Estate and Effects of the said *W. J. Roberts* as upon taking the said Account shall appear to have come to his hands, and to be remaining in specie, and undisposed of, together with all Books, Papers, and Writings in his custody or power, belonging, or in anywise relating, to the said *W. J. Roberts*, his Estate or Effects. And I do order that the Costs of the said Meeting, for the removal of the said *N. Thorley* for the new choice of an Assignee or Assignees in his room and stead, for taking the Account hereinbefore directed, the Costs of the said new Assignment and Conveyance, together with the Costs of, and occasioned by, the present application, be paid by the said *N. Thorley*, such Costs to be settled by the said Commissioners in case the Parties shall differ about the same. And I do further order, that if the new Assignee or Assignees, when so chosen as aforesaid, do not continue any Action, Suit or Petition already instituted, that in that case the said *N. Thorley* do pay the Costs so incurred, unless the Master herein-after named report that such Costs were properly in-

curred ; but if they do continue such Action, Suit or Petition ; and it shall be necessary that the said *N. Thorley*'s name should be used, that they are hereby at liberty so to use his name, on his being secured and indemnified by the new Assignee or Assignees when so chosen as aforesaid, against any Suit, Action or Petition, that may be brought or had against him for Costs, by reason or in consequence of the continuation of the name of the said *N. Thorley* in the proceedings already instituted ; and that it be referred to Mr. *Courtenay*, one of the Masters of the Court of Chancery, to take a proper Security and Indemnity from the new Assignee or Assignees, when so as aforesaid chosen, for the purposes before stated ; such Indemnity to be also at the expense of the said *N. Thorley*, to be settled by the said Master, in case the Parties shall differ about the same."

1818.

*Ex parte
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HENDERSON v. M'IVER.

ON Exceptions to the *Master's Report*, the Vice-Chancellor held, that from the nature of the accounts the Executor was justified in employing an Accomptant, and that the Expense ought to be allowed in his Accounts.

30th June.

1818.

HESELTINE v. HESELTINE.

30th June.

Testator bequeathed to his Wife his Furniture at D. C. and at W. He afterwards removed part of the furniture at D. C. to B. S. Held Furniture at B. S. did not pass.

THIS Cause came on, upon Exceptions to the Master's Report.

James Heseltine, by his Will, dated the 2d day of September 1796, bequeathed, "to my dear Wife *Frances Heseltine*, exclusive of, and over and above the provision made for her under and by virtue of the Settlement made previous to our Marriage, all my Household Goods, Plate, Linen, and China; and also all the Wine and other Liquors, Goods and Chattels whatsoever that shall be in or about my Dwelling Houses in *Doctors Commons*, and at *Walthamstow*, in the County of *Essex*, at the time of my decease; and also my Coach and other Carriages, with my Horses, and all my Live Stock at *Walthamstow* aforesaid, to and for her own use and benefit."

After the making of the Will, the Testator took a House in *Bedford Square*, and removed to it the greater part of the Furniture from his House in *Doctors Commons*.

The question was, Whether the Bequest in the Will passed the Furniture, &c. removed to *Bedford Square*?

Mr. Bell, and Mr. Abercromby, in support of Exceptions.

Mr. Roupell, contra.

The VICE-CHANCELLOR:—

Probably, if the Testator had been asked, whether he meant to give his Wife the Furniture in *Bedford*

Square, he would have answered in the affirmative; but a Gift of such Furniture as should be in his House at *Doctors Commons*, and at *Walthamstow*, at the time of his decease, cannot pass Furniture which at the time of his decease was in his house in *Bedford Square*.

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Exceptions overruled (a.)

(a) See the Cases mentioned in *Prin. and Prac.* 2 Madd. 78.

LOWE and RICHARDSON v.

30th June.

THIS was an Interpleading Bill by the Captain of the ship *Congress*, from Savannah, against the Consignee, and also against a Person who insisted that the Captain ought not to deliver according to the Bill of Lading, because the Consignor had acted with fraud towards him in making the Consignment. It appeared that the Defendant claiming against the Bill of Lading had filed a prior Bill against the Captain and the Consignee, and had in that Suit obtained an Injunction against the Captain, to restrain him from delivering the Cargo to the Consignee.

Captain may file a Bill of Interpleader where Parties claim adversely under the Bill of Lading; sed qu. where the adverse claims are paramount to the Bill of Lading.

The Vice-Chancellor refused the Injunction applied for in this Cause by the Captain, stating that he was already fully protected by the former Suit, and that his Bill was unnecessary.

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The *Vice-Chancellor* added, that although a Captain might file a Bill of Interpleader where Parties claimed adversely at Law or in Equity under the Bill of Lading, yet he doubted whether a Captain should in any case file a Bill of Interpleader where the adverse claims were not under the Bill of Lading, but paramount to it. Delivery according to the Bill of Lading would fully justify the Captain, and those who alleged an equity paramount to the Bill of Lading and against the Consignor, should assert it by a Suit of their own.

TYSON v. COX.

30th June.

APPLICATION was made for an Order to suspend the payment of the Costs of a Bill which had been dismissed, on the ground of an Appeal to the *Lord Chancellor*.

Mr. Roupell, in Support of the Motion, cited *Willan v. Willan* (a).

Mr. Newland, as *Amicus Curiae*, mentioned the Case of *Dunster v. Mitford*, 20th July 1815, where it was held, a Defendant may, notwithstanding an Appeal, sue out a Subpoena for Costs.

The *Vice-Chancellor* refused the Motion.

(a) 16 Ves. 218.

1818.

Ex parte DUNLOP.

WASHINGTON BOWIE, living in *America*, sent over to his Agent, *William Murdock*, an Affidavit of the Debt due from the Bankrupt; and on the production of the same by the Attorney of *Murdock*, to the Commissioners, a proof was allowed of the Debt.

1st July.

A Petition having been presented to expunge this Debt, a Motion (*a*) was now made, that Service on the Agent, to whom the Affidavit of Debt was sent, might be deemed good Service; and the same was ordered.

HYDE v. WROUGHTON.

2d July.

ON Motion, 25th June 1817, a Reference as to Title had been made in this Cause; and Mr. Parker now moved for a further Order, that in case the *Master* should find that the Plaintiff can make a good Title, to enquire and state to the Court whether previously to or at the time of filing the Bill, the Plaintiff had shewn to the Defendant a good Title to the Premises in question in the Cause: and that the said *Master* might be at liberty to include what he might find relative

A Reference having been made as to Title on one Motion, the Party cannot afterwards, by another Motion, have a Reference as to the delivery of the Abstract.

(*a*) That such an Application may be made by Motion, see *Ex parte Paton*, ante, p. 116.

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thereto in his Report to be made pursuant to the before-mentioned Order, or to make a separate Report thereof if he thought fit.

The VICE-CHANCELLOR:—

Great additional expense and delay are occasioned by Parties not asking in the first instance, where the circumstances of the Case make it material, that if the *Master* should find that a good Title can be made, then that he may inquire when such good Title was first shown to the Purchaser. I think it would be a useful Rule, that no second order should be made for such a purpose before the *Master's* Report, and that after the *Master's* Report such second reference should not be made without a special Case.

Motion refused (a).

LYNN v. BUCK.

14th July.

Practice as to exhibiting further Interrogatories before the Master.

A DECREE, 9th March 1815, was made, directing the *Master* "to take an Account of what is due to the Plaintiff for or in respect of the Tithes arising, growing, and renewing" on the Lands in the Bill mentioned, except as to *Temple Farm*, as to which an Issue was directed as to a Modus set up.

On the 10th March 1817, an Order was made for an Account of the Tithes of *Temple Farm*.

On the 11th July 1817, Interrogatories were exhibited for the examination of the Defendant, as to the *Vicarial*

(a) *Vid. Jennings v. Hopton*, 1 vol. p. 211.

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Tithes only of all the Lands; and, on the 18th of the same month, the Interrogatories were allowed.

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On the 13th January 1818, an examination was put in, the Defendant being in Custody upon an Attachment for Contempt.

On the 1st April 1818, further Interrogatories were exhibited, for an account of *all* Tithes of the Lands in question, but the *Master* expressed a doubt whether he could entertain further Interrogatories in any Case; and afterwards refused to allow them.

On the 7th May 1818, an Order was made for the *Master* to look into the Plaintiff's Interrogatories, and Defendant's Examination, and certify if the latter was sufficient.

On the 3d June 1818, the *Master* reported the Examination insufficient.

A Motion was now made, that the Plaintiff might be at liberty to exhibit further Interrogatories for the examination of the Defendant, touching the Accounts directed to be taken by the Decree and Order made in the Cause; and that the Defendant might put in his Examination to such further Interrogatories at the same time he puts in his further and better Examination in the Cause; the Examination already put in by the Defendant having been reported insufficient: and that it might be referred to the *Master* to tax the Plaintiff's Costs, on the application to refer the former Examination to the *Master*, of the proceeding had thereon, of this application, and of the taxation; and that the same,

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when so taxed, might be paid by the Defendant to the Plaintiff.

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Mr. Barber, in support of the Motion:—

The *Master* refused to allow the additional Interrogatories, on the authority of a MS. Case, *Wood v. Milburn*, May 1801, where further Interrogatories were exhibited before *Master Campbell* (the Master in this Cause), for the examination of the Defendant in account of Tithes. He refused to allow them. The Court was moved, and the *Lord Chancellor* thought the *Master* was right in refusing to allow the additional Interrogatories, but gave the Plaintiff leave to exhibit fresh Interrogatories on payment of the Costs of the Application. Supposing the *Master* right in his objection, yet now, on a Special Motion, the Court will make the Order as prayed: He cited also an anonymous Case, 3 Atk. 478.

Mr. Roupell, contra, contended the *Master* was right.

The VICE-CHANCELLOR:—

My impression is, that if there was a slip in the Interrogatories as at first exhibited, the *Master* was at liberty, without any application to the Court, to admit of additional Interrogatories. Let the Motion stand over, and let the Plaintiff exhibit the additional Interrogatories before the *Master*, with an intimation of the Opinion of the Court; and if the *Master* shall then, on consideration, refuse to receive them, I will consider what is to be done. It is important the practice should be settled (a).

(a) See *Hatch v. ——*, 19 Ves. 116.

1818.

Between ROBERT JOHNSON and WILLIAM ELIS, two of the Bond Creditors; and WILLIAM HOLIDAY and THOMAS NICHOLSON, Creditors by Simple Contract of Sir JOHN LEGARD, late of *Ganton*, in the East Riding of the County of York, and afterwards of *Sunbury*, in the County of *Middlesex*, Baronet, deceased; on behalf of themselves and all other the Bond and Simple Contract Creditors of the said Sir JOHN LEGARD, who shall come in and contribute to the said Suit - Complainants:

And

Sir THOMAS LEGARD, Baronet, THOMAS DIGBY LEGARD, an Infant, the eldest Son of the said Sir THOMAS LEGARD, WILLIAM LEGARD, Clerk, DIGBY LEGARD, Esquire, RICHARD WATT, Esquire, and RALPH CREYKE, Esquire - - - - - Defendants.

17th July.

THIS was a Bill for the specific performance of an Agreement to sell certain Lands; and the *prayer* of the Bill was, that it might be declared that the Limitations in Remainder, contained in an Indenture of Release of the 15th June 1782, subsequent to the Limitation therein contained to the first and other Sons of said Sir John Legard, by any Wife he should afterwards marry in Tail Male, are, so far as they respect the Hereditaments and Premises contracted to be sold to Defendant *Richard Watt*, fraudulent and void; and that the said Agreement of the 30th October 1807 (the Agreement for the purchase) might be specifically performed,

*Limitations in
a Marriage Set-
tlement to the
Brothers of the
Settlor, are not
good against a
subsequent Pur-
chaser, for a
valuable Consi-
deration.*

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and proper Conveyances executed of all the Hereditaments and Premises comprised therein, to the said *Richard Watt*; and that the said *Richard Watt* might be directed to pay the Purchase Money for what the said Hereditaments and Premises were contracted to be sold, to the said *Digby Legard*, as part of the Personal Assets of the said Sir *John Legard*; and that the same, when received, might be applied in a proper course of administration, and the debts due to the Plaintiffs and such other of the Creditors of said Sir *John Legard*, as should come in and contribute to the expense of the Suit, be thereout paid, and for that purpose, if necessary, that the proper accounts might be directed, and all other necessary directions given.

When the Cause came on to be heard before His Honor the Master of the Rolls on the 17th day of December 1813, He was pleased to direct that a Case should be made for the opinion of the Court of King's Bench, and further directions were reserved until after the Judges should have made their Certificate. The Case, as stated for the opinion of the Judges, was as follows :

"Sir *John Legard*, Baronet, deceased, was in his life-time and previous to, and at the time of executing the Indentures of Settlement next hereinafter mentioned, seised in Fee Simple of divers Lands and Hereditaments lying in the Counties of *York* and *Northumberland*, which are in the said Indentures of Settlement comprised and described.

"That previous to and in contemplation of the Marriage of the said Sir *John Legard*, with *Catherine*

Lapel Aston, afterwards Dame *Catherine* his Wife, certain Indentures of Lease and Release, bearing date respectively the 14th and 15th days of June 1782, were duly executed by the several persons therein named as parties thereto, the Lease being between the said Sir John Legard of the one part, and *Thomas Grimston* and *Edward Dicconson*, on the other part, and in due form of law to warrant the Release; and the Release being between the said Sir John Legard of the first part, *Henry Aston*, Esquire, therein described, and *Catherine Lapel Aston* before named, of the second part; the said *Thomas Grimston* and *Edward Dicconson* of the third part; *Thomas Eccleston* and *Edward Standish*, Esquires, of the fourth part; and *Henry Harvey Aston* and *Anthony Hodges*, Esquires, of the fifth part: And by such Release, after reciting that a Marriage was intended by God's permission to be shortly had and solemnized, between the said Sir John Legard and *Catherine Lapel Aston*; and upon the solemnization thereof, and by virtue of and under a certain Indenture, tripartite, bearing equal date therewith, and made or mentioned to be made between the said *Henry Aston* of the first part, the said *Catherine Lapel Aston* of the second part, and the said Sir John Legard of the third part, she the said *Catherine Lapel Aston* would become entitled to a Portion or Fortune of 4,000*l.* chargeable upon divers Manors or Lordships, Messuages, Lands, Tenements and Hereditaments therein particularly mentioned. And that the said Sir John Legard was seised in his own demesne as of Fee Simple to him and his Heirs, of and in the several Manors or Lordships, Adtwsons, capital and other Messuages, Lands, Tenements, Tithes and Hereditaments therein and hereinafter mentioned, to be thereby granted and released, and to be

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situate and arising within the said County of *York*, subject to the payment of an Annuity or yearly Rent-charge of 500*l.* unto Dame *Jane Legard*, his Mother, for her Life, for her Jointure; and also to the Sum of 6,000*l.* for the Portion of the Brothers and Sisters of the said Sir *John Legard*, which were charged upon the said Premises in and by the Settlement made upon the Marriage of Sir *Digby Legard* with the said Dame *Jane Legard*; and that the said Sir *John Legard* was also seised as of Fee Simple to him and his Heirs, of and to three fourth parts or shares undivided, of and in the Manor or Lordship, Messuages, Lands, Tenements and Hereditaments thereafter mentioned to be thereby granted and released, and to be situate in the County of *Northumberland*, subject to a Mortgage thereon, or upon some part thereof, for securing the Sum of 2,000*l.* and Interest, unto the Reverend Mr. *Pigott*; and that upon the treaty of the said intended Marriage, it had been agreed that the said Sir *John Legard* should have or receive the said Sum of 4,000*l.*, being the Fortune or Portion to which the said *Catherine Lapel Aston* would become entitled as aforesaid; and that he would discharge thereout and pay the said Sum of 2,000*l.*, and interest due and to grow due upon the said *Northumberland* Estate, so that the said Estate might be exonerated from the said mortgaged Money: It was witnessed, that in consideration of the said intended Marriage, and of the Marriage Portion to which the said *Catherine Lapel Aston* would become entitled, and which it was agreed should be paid to the said Sir *John Legard* as aforesaid, and for the settling a Jointure and Provision of Maintenance for the said *Catherine Lapel Aston*, in case the said intended Marriage should take effect, and she should happen to

survive, the said Sir *John Legard*, her intended husband, and for making a provision for the issue of the said intended Marriage, and for settling and assuring the said several Manors or Lordships, Advowsons, Capital, and other Messuages, Lands, Tenements, Tithes, and Hereditaments, and Parts and Shares of the Manors or Lordships, Messuages, Lands, Tenements and Hereditaments thereafter mentioned, to be thereby granted and released to the several uses, and to and for the several intents and purposes, and under and subject to the several Powers, Provisoes, Limitations and Agreements thereafter declared or expressed concernning the same, and also for and in consideration of the sum of 10s. of law-ful money of Great Britain, by the said *Thomas Grimston* and *Edward Dicconson*, to the said Sir *John Legard*, in hand, at or before the sealing and delivery thereof, well and truly paid, the receipt whereof was thereby acknowledged, he the said Sir *John Legard* granted, bargained, sold and released unto the said *Thomas Grimston* and *Edward Dicconson*, in their actual posses-sion then being, by virtue of the said Lease, and to their Heirs and Assigns, amongst other things, all those two Manors or Lordships of *Etton*, in the said County of *York*, and all and every the Messuages, Lands, Tene-ments, and Hereditaments thereunto respectively be-longing, situate, lying and being in *Etton* aforesaid, to hold the same unto the said *Thomas Grimston* and *Edward Dicconson*, their Heirs and Assigns, to the several Uses, upon the several Trusts and Confidences, and to and for the several intents and purposes, and subject to the several Powers, Provisoes and Agreements thereinafter limited, declared, or expressed, of and concern-ing the same (that is to say) in the mean time, until the said intended Marriage should be had and solemnized,

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to the use of the said Sir *John Legard*, his Heirs and Assigns, and from and after the solemnization thereof, to the use of Sir *John Legard* and his Assigns, during his natural life, without impeachment of waste; with remainder to the use of the said *Thomas Grimston* and *Edward Dicconson* and their Heirs, during the life of the said Sir *John Legard*, upon trust to preserve the contingent Remainders thereafter limited, with Remainder; to the use and intent that the said *Catherine Lapel Aston* and her Assigns, in case she should survive the said Sir *John Legard*, should during her natural life receive thereout the Rent-charge or annual Sum therein mentioned as her Jointure, and in bar of Dower, with the usual powers of Distress and Entry for recovering the same in case of non-payment; with Remainder to the use of the said *Thomas Eccleston* and *Edward Standish*, their Executors, Administrators and Assigns, for the term of one hundred years, determinable upon the death of the said *Catherine Lapel Aston*, in trust for the better securing payment of the last-mentioned Rent-charge; with Remainder to the use of the said *Henry Harvey Aston* and *Anthony Hodges*, their Executors, Administrators and Assigns, for the term of 500 years, upon trust for raising certain Portions in the said Indenture of Release specified, for the Daughters and younger Sons of the said Marriage; with Remainder to the use of the first and other Sons of the said Marriage, successively in Tail Male, with Remainder to the use of the first and other Sons of the said Sir *John Legard*, by any future Wife, successively in Tail Male, with Remainder to the use of *Thomas Legard*, now the Defendant, Sir *Thomas Legard*, Bar^t. a Brother to the said Sir *John Legard*, during his life, without impeachment of waste; with Remainder to the use of the said *Thomas Grimston*

and *Edward Dicconson* and their Heirs, during the natural life of the said Sir *Thomas Legard*, in trust to preserve the contingent Remainders thereinafter limited; with Remainder to the use of the first and other Sons of the said Sir *Thomas Legard*, successively in Tail Male, with Remainder to the use of *George Legard*, therein described, another Brother of the said Sir *John Legard*, since deceased, during his life, without impeachment of waste; with Remainder to the use of the said *Thomas Grimston* and *Edward Dicconson* and their Heirs, during the life of the said *George Legard*, in trust to preserve contingent Remainders, with Remainder to the use of the first and other Sons of the said *George Legard* successively in Tail Mail; with Remainder to the use of *William Legard*, now of *Gauton* aforesaid, Clerk, another of the Brothers of the said Sir *John Legard*, during his life, without impeachment of waste; with Remainder to the use of the said *Thomas Grimston* and *Edward Dicconson* and their Heirs, during the life of the said *William Legard*, in trust to preserve contingent Remainders, with Remainder to the use of the first and other Sons of the said *William Legard*, successively in Tail Mail; with Remainder to the use of Defendant, *Digby Legard*, now of *Gauton* aforesaid, Esq., another Brother of the said Sir *John Legard*, during his life, without impeachment of waste; with Remainder to the use of the said *Thomas Grimston* and *Edward Dicconson* and their Heirs, during the life of the said *Digby Legard*, in trust to preserve contingent Remainders, with Remainder to the use of the first and other Sons of the said *Digby Legard*, successively in Tale Male; with Remainder to the use of *Richard Legard*, Esq. another Brother of the said Sir *John Legard*, during his life, without impeachment of waste; with Remainder to the

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use of the said *Thomas Grimston* and *Edward Dicconson* and their Heirs, during the life of the said *Richard Legard*, in trust to preserve contingent Remainders, with Remainder to the use of the first and other Sons of the said *Richard Legard*, successively in Tail Male; with Remainder to the use of the said Sir *John Legard* in Fee-simple: The Marriage intended to be had between the said Sir *John Legard* and *Catherine Lapel Aston*, was, shortly after the execution of the said Indenture, and long previous to the execution of the Indentures next hereinafter mentioned, duly had and solemnized, and there was never any Issue of the said Marriage.

By Indentures of Lease and Release, bearing date the 12th and 13th days of October 1807; Sir *John Legard*, for a valuable Consideration, conveyed to *Richard Watt*, Esq. his Heirs and Assigns, certain Estates, Lands and Hereditaments, lying within the Manor and Lordship of *Elton* aforesaid, in the said County of *York*, part of the Lands and Premises comprised in the said Indentures of Settlement of the 14th and 15th days of June 1782.

At the time of making the said Conveyance to the said *Richard Watt*, and before he paid his purchase Money, he the said *Richard Watt* had notice of the said Settlement made on the Marriage of the said Sir *John Legard*.

Sir *John Legard* is dead, without having had any Issue.

A Suit having been instituted in the High Court of Chancery, by the above-named Complainants against

the above-named Defendants, and a Question having arisen, whether the Limitations contained in the said Indenture of Release of 15th June 1782, subsequent to the Limitation to the first and other Sons of the said Sir John Legard, by any future Wife successively in Tail Male, are, under the Circumstances hereinbefore stated, without any valuable Consideration, and therefore void against the said *Richard Watt*, as a purchaser for a valuable Consideration.

The Question for the Opinion of the Court, was directed to be,—

Whether the Limitations contained in the said Settlement, made on the Marriage of the said Sir John Legard with the said *Catherine Lapel Aston* his Wife, which are subsequent to the Limitations therein contained, to the use of the first and other Sons of the said Sir John Legard by any future Wife, in Tail Male, or any of such Limitations, are good and valid Limitations as against the said *Richard Watt*, claiming to be entitled under and by virtue of such Conveyance to him as aforesaid ?

In Answer to this Case the Judges of the Court of King's Bench sent the following Certificate :—

“ We have heard this Case argued by Counsel, and have considered it, and are of Opinion that none of the Limitations contained in the said Settlement made on the Marriage of the said Sir John Legard with the said *Catherine Lapel Aston* his Wife, which are subsequent to the Limitations therein contained to the use of the first and other Sons of the said Sir John Legard by any future Wife in Tail Male, is a good and valid Limitation

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as against the said *Richard Watt*, claiming to be entitled under and by virtue of such Conveyance to him as aforesaid."

" **ELLENBOROUGH,**
 " **J. BAILEY,**
 " **C. ABBOT,**
 " **G. S. HOLROYD.**"

This Cause came on now for further directions, upon the Judges Certificate, and *M-. Sugden* was heard against it; but *His Honor* expressed his entire concurrence with the Certificate, and decreed according to the Prayer of the Bill (a).

Limitations in a Marriage Settlement in favour of the Issue of a second Marriage by the Settlor, held good against a Purchaser for a valuable Consideration; such Limitations being interposed between the Limitations to the Sons of the first Marriage and the Daughters of such.

(a) In a prior cause of *Clayton v. Earl Winton*, the following Case was sent for the opinion of the Judges of the Court of King's Bench:—

" The Plaintiff, being seised in Fee Simple of several Freehold Estates of inheritance comprised in the Deeds of Settlement after mentioned, previously to, and in contemplation of, his marriage with *Susan Nuttall*, his late Wife, now deceased, by Indentures of Lease and Release, or Marriage Settlement, bearing date the 28th and 29th days of November 1788, and made between the Plaintiff *Thomas Clayton*, of the first part; *Susan Nuttall*, Spinst^r, of the second part; the Right Honourable *Lord Grey, Baron Grey de Wilton*, and *Charles Townley*, of the third part; and *Rundall*

Andrews, and *Thomas Whitehead*, of the fourth part; after reciting, that the said *Susan Nuttall* was possessed of, interested in, and entitled unto, a Portion or Fortune consisting of several Sums of Money, placed out at Interest, to several Persons, upon several Mortgages, taken for the same in her own name, and in the names of the Executors named in the Will of her late Father during her minority, whereupon there was due for Principal Money and Interest, the Sum of 7,000*l.* and upwards, and that a Marriage by God's permission, was intended shortly to be had and solemnized between the said *Thomas Clayton* and *Susan Nuttall*; and upon the treaty thereof, it had been proposed and agreed, that in case the said intended Mar-

riage took effect, the Portion or Fortune to which the said *Susan Nuttall* was interested in, or entitled unto, as aforesaid, should be paid and applied in or towards discharging certain Sums of 10,073*l.* therein mentioned, which were good charges in equity upon the said Estates of the said Plaintiff; and that it had been agreed, that the same Hereditaments and Premises should be settled, limited, and assured to, for and upon such Uses, Trusts, Intentions and Purposes, and under and subject to such Powers, Provisoes, Conditions, Limitations and Agreements as are therein-after mentioned, and in consideration of the Sum of 10*l.* of lawful Money of Great Britain by the said *Lord Grey, Baron Grey de Wilton, Charles Townley, Rundall Andrews, and Thomas Whitehead*, to the said *Thomas Clayton* in hand well and truly paid, the receipt whereof is thereby acknowledged, he the said *Thomas Clayton* did grant, release and convey the several Freehold Estates and Hereditaments, situate in the County of *Lancaster*, therein particularly described, with the Appurtenances, unto the said *Lord Grey, Baron Grey de Wilton, Charles Townley, Rundall Andrews, and Thomas Whitehead*, and their Heirs, to the use of the said Plaintiff and his Heirs, till the said Marriage, and afterwards to the use of the said Plaintiff and his Assigns for Life, without impeachment of waste; with remainder to the use of the said *Lord Grey, Baron Grey de Wilton, Charles Townley, Rundall Andrews and Thomas Whitehead*, and their Heirs, during the life of the said Plaintiff,

Premises to, for and upon such Uses, Trusts, Intentions and Purposes, and under and subject to such Powers, Provisoes, Conditions, Limitations and Agreements as are therein-after mentioned, and in consideration of the Sum of 10*l.* of lawful Money of Great Britain by the said *Lord Grey, Baron Grey de Wilton, Charles Townley, Rundall Andrews, and Thomas Whitehead*, to the said *Thomas Clayton* in hand well and truly paid, the receipt whereof is thereby acknowledged, he the said *Thomas Clayton* did grant, release and convey the several Freehold Estates and Hereditaments, situate in the County of *Lancaster*, therein particularly described, with the Appurtenances, unto the said *Lord Grey, Baron Grey de Wilton, Charles Townley, Rundall Andrews, and Thomas Whitehead*, and their Heirs, to the use of the said Plaintiff and his Heirs, till the said Marriage, and afterwards to the use of the said Plaintiff and his Assigns for Life, without impeachment of waste; with remainder to the use of the said *Lord Grey, Baron Grey de Wilton, Charles Townley, Rundall Andrews and Thomas Whitehead*, and their Heirs, during the life of the said Plaintiff,

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upon Trust; to preserve contingent Remainders, with remainder to the said *Susan Nuttall* and her Assigns, to receive a certain Rent-charge thereout for her Jointure and in bar of Dower, with Remainder to the use of the first and other Sons of the said Plaintiff on the body of the said *Susan Nuttall* to be begotten, and the Heirs Male of their bodies severally and successively in Tail Male, with Remainder to the use of the first Son of the said Plaintiff on the body of any woman or women he might happen to marry after the decease of the said *Susan Nuttall*, to be begotten, and the Heirs Male of the body of such first Son lawfully issuing, with Remainder to the use of the second, third, fourth, and all and every other Son and Sons of the said Plaintiff, on the body of any such woman or women as he might happen to marry after the decease of the said *Susan Nuttall*, to be begotten, and the Heirs Male of his and their body and bodies issuing, with Remainder to the use of all and every the Daughter and Daughters of the said Plaintiff, on the body of the said *Susan Nuttall* to be begotten, equally to be divided between such Daughters (if

more than one) Share and Share alike, as Tenants in common, and of the Heirs of the body and bodies of such Daughter and Daughters lawfully issuing, and failing issue of any of the said Daughters, then as to the Share or Shares of such Daughter or Daughters whose issue should fail, to the use of all and every other such Daughter or Daughters in like manner, and of the Heirs of the body and bodies of such other Daughter or Daughters lawfully issuing; and in case all such Daughters, save one, should die without issue, or if there should be but one such Daughter, then to the use of such one surviving or only Daughter, and the Heirs of her body, with Remainder to the use of the said Plaintiff and his Heirs for ever."

"That the Marriage between the said Plaintiff and *Susan Nuttall* soon afterwards took effect, and the said *Susan Nuttall* is since dead without issue, and after her decease, and before the Plaintiff married a second Wife, he, by Indentures of Lease and Release, dated the 17th and 18th days of June 1794, duly executed and made between the said Plaintiff of the one part, and *Lady Mary Stanley* of the other

part, for a full and valuable Consideration by her to him in hand paid, granted and released, and conveyed certain parts of the Freehold Estates and Hereditaments comprised in and settled by the before-mentioned Indentures and Marriage Settlement, with the Apurtenances, unto and to the use of the said *Lady Mary Stanley*, her Heirs and Assigns, for ever absolutely."

"*Lady Mary Stanley* insists that the Limitation to the Children of the second Marriage of the Plaintiff, is without any valuable consideration, and therefore void against her as a Purchaser."

"The Question for the Opinion of the Court, is:—

"Whether such Conveyance by the Plaintiff to *Lady Mary Stanley*, is a good and valid Conveyance to a Purchaser for a valuable consideration against the Issue of the Plaintiff's second Marriage?"

To this Question, the Judges returned the following *Certificate*:

"This Case has been argued before us by Counsel, we have considered it, and are of opinion, that the Conveyance by the Plaintiff to *Lady Mary Stanley*, is not a good and valid Conveyance against the Issue of the Plaintiff's second Marriage.

"ELLERBOROUGH,
"R. GROSE,
"S. LE BLANC,
"J. BAYLEY."

In the case of *Smith v. Garland*, 2 Meriv. 129, the Settlement was sought to be set aside by the Settlor, which it was held he could not do, though the Settlement was voluntary as against the party claiming under it. See *Sutton v. Chetwynd*, 3 Meriv. 249, in which Case the *Master of the Rolls* (Sir W'm. Grant) acted upon the decision by the Judges of the King's Bench, in the above Case of *Clayton v. Earl Winton*, as to which he expressed his entire concurrence.

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Between SARAH HENSHAW, Widow, and ANN HADFIELD, Spinster, Niece, and only next of Kin of THOMAS HENSHAW, deceased - Plaintiff:
And

JOHN ATKINSON, the ATTORNEY-GENERAL,
and others - - - - Defendants.

20th and 21st
July.

*A Sum of
Money was be-
queathed to erect
a Blue Coat
School and es-
tablish a Blind
Asylum, with a
direction that
Lands should not
be purchased, and
the expression of
an expectation
that Lands would
be given for the
Charities. The
bequest held not
to be void under
the Mortmain
Act.*

*THOMAS HENSHAW, by his Will, 14th day of November 1807, after making certain devises of his real Estates, gave several pecuniary Legacies, and, amongst the rest, an Annuity of 200*l.* per annum to the Plaintiff Sarah Henshaw, which the said Testator declared should be in bar and satisfaction of the said Plaintiff's Dower and Freebench; and the said Testator also bequeathed as follows:—"Whereas it is my wish and intention that a Blue Coat School be erected at Oldham, and a Blind Asylum established at Manchester, under the management and direction of certain Trustees to be hereafter appointed, I hereby give and bequeath 20,000*l.*, in Trust, to the said Trustees, to each of the said Charities, subject to such Uses, Limitations, and Conditions as shall afterwards be determined for the government thereof; but I direct that the said Monies shall not be applied in the purchase of Lands, or the erection of Buildings, it being my expectation that other Persons will, at their expense, purchase Lands and Buildings for those purposes. And as for and concerning all the rest, residue and remainder of my personal Estate, I give and bequeath the same, in Trust, to the Trustees of the said intended Charities, to be*

equally divided, and for the equal benefit of each of the said Charities."

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The Testator appointed *John Atkinson* and *Joseph Atkinson*, (two of the Defendants,) and the Plaintiff *Sarah Henshaw*, Executors and Executrixes of his Will.

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The Testator made a Codicil 9th day of January 1808, as follows:—"I, *Thomas Henshaw*, do make this as a Codicil to this my last Will and Testament; viz. I hereby give and bequeath to my dear Wife *Sarah Henshaw*, all such sum or sums of Money as she already has, or hereafter may have saved from her Jointure or other Property, or from such Allowance as I have from time to time agreed to make towards the expense of Housekeeping, it being my will and intention that no part of her Property, before or since her Marriage, shall be received by me or my Executors as part of my Estate. I give and bequeath to the Blue Coat School before mentioned the Sum of 20,000*l.*, empowering my Executors to fix the Establishment of the said Blue Coat School at *Manchester*, instead of *Oldham*, if they think it more convenient." The Testator afterwards made another Codicil, in which he bequeathed Legacies to several other Charitable Institutions. By a third Codicil, 9th May 1808, the Testator, amongst other things, nominated several Persons as Trustees for the Charity of the Blue Coat School, and Blind Asylum, with power to fill up the number whenever they were reduced to nine by death or resignation, and then the Codicil proceeded thus:—"It is my will and intention that the Sums which I have bequeathed of 40,000*l.* to the Blue Coat School and 20,000*l.* to the Blind Asylum,

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making together 60,000*l.*, shall continue in the House or Firm at *Oldham*, in conformity to and during our Articles of Partnership, and for such longer time as my Executors consider the Principal and Interest of the said Sum secure for the benefit of the said Charities; it being my will that the Interest of the said 60,000*l.* be paid annually to the Trustees of the said Charities, for the maintenance and support thereof." And the Testator made a fourth Codicil to his said Will, 27th July 1809, but it was not executed and attested as required for passing real Estates, or for effecting a revocation of a devise of real Estates. This paper writing was as follows: "I, *Thomas Henshaw*, do make this Codicil to my last Will and Testament, and hereby revoke and make null and void my Legacy of the Close of Meadow Land, called *Frankhill*, which I have devised to *James Barker*, it being my intention to appropriate the said Close for the building of a Blue Coat School, which I have endowed by my last Will; and as I have provided more amply for the said *James Barker*, by admitting him a Partner in the Trade or Business at *Oldham*, from the 1st of January 1808; I consider he is fully repaid for the consideration of the said Field, which I should otherwise have made him some other consideration for, about the same value."

The Question was,—Whether the Bequests for the establishment of a *Blue Coat School* and *B&nd Asylum*, were void under the Statute 9 Geo. II. c. 36?

Sir A. Pigott and Mr. Charles Warren, for Plaintiffs.

The object of the Bill is to set aside the Legacies given to these two Charities. The Testator has endeavoured

to elude the Mortmain Act. Lands and Buildings were necessary for the *Blue Coat School* and the *Asylum for Indigent Blind*, but as the Testator knew he could not by his Will direct Lands to be purchased and Buildings erected, he has stated in his Will an expectation that Lands would be given for that purpose. In the *Attorney General v. Tyndall*, it was decided at the *Rolls*, that Personal Estate left to a Charity where the erection of Almshouses was necessary for the Charity, was not void, but that two years should be allowed to the Trustees for procuring, if they could, a gift of Land, on which the Almshouses might be built; but Lord *Northington* (*a*) reversed that Decree, and that reversal has ever since been considered as having established the Law; his Opinion being, that a Bequest of Money to be laid out in building upon Land that should be given by another Person, is just as contrary to the spirit of the Statute, as to purchase Land. This Decision overruled Lord *Hardwick*'s Determination in *Attorney General v. Bowles* (*b*). In the *Attorney General v. Whitchurch* (*c*), Lord *Alvanley* was of opinion, *Attorney General v. Bowles*, was not Law. The Will must be carried into execution at the death of the Testator, but at his death no Lands had been given to erect Buildings on. The gift of Lands was a condition precedent, upon which the Bequest was founded, and not having taken place during the Testator's Life, the Bequest cannot take effect. The leaving of Money in this way, expressing an expectation that Land will be given, is an inducement for others to give Land, and is contrary to the object of the Mortmain Act. It is an endeavour to evade the Act. It would

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(*a*) 2 *Eden*, 207.

(*c*) 3 *Ves.* 141, see p. 144.

(*b*) 3 *Atk.* 806, 2 *Ves.* 547.

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be strange to say that a Testator cannot give Money to be laid out in Lands, but that he may give it to be laid out on Lands to be given by another. In *Attorney General v. Davies*, (*d*) the *Master of the Rolls* says, "It is an absurd distinction, that a Testator shall not give Lands to a Charity, but he may give Money in consideration of another giving Land for a Charity." No Lands having been given in the Testator's life, or since his death, eight years, how long is this Money to be locked up in the expectation that some Person will give Lands? Such uncertainty of itself vitiates the Bequest. Suppose the Testator had made this Bequest, provided any Person should within fifty years make a gift of Land, would this Fund of 60,000*l.* have been allowed to accumulate for such a length of time? Here, however, no time is fixed, the accumulations are to continue indefinitely until a gift of Lands is made, which may never take place. From the fourth Codicil it appears the Testator intended to give Land for the Charity, concluding, probably, at that time, that no Lands would be given.

The doctrine of *cy pres* (a strange doctrine) will not apply to this Case, the object of the Bequest being certain particular Charities, and founded on the expectation that a gift of Land would be made (*e*).

*The Solicitor General, Sir Samuel Romilly, Mr. Hart,
Mr. Horne, and Mr. Duckworth, for the Defendants,
the Trustees and Executors:—*

This is a new Case. A Bequest of Money for the improvement of Land already in mortmain, is good.

(*d*) 9 Ves. 543.

(*e*) See *Attorney General v. Hurst*, 2 Cox, 35.

Lord Northington, in *Attorney General v. Tyndall*, held such a Bequest to be bad, but subsequent Cases have clearly overruled his doctrine (f). It has been held that a Bequest for the establishment of a Charity, which Charity could not take effect without the purchase of Lands, is a Case within the Statute; because the Testator is presumed to have intended a purchase of Lands: but here no such presumption can take place; there is a direction not to purchase Land, and an expectation expressed that Lands will be given. It is said that the Bequest operates as an inducement to others to give Land to be put in Mortmain; suppose it does; the Act does not prohibit such an inducement. It is then said, that the accumulation may be indefinitely postponed, but that objection fails, for according to *Attorney General v. Bowles* (g), the Court will fix a time within which the Gift must take place. So long as this Will is in dispute and its validity questioned, it was not likely that any gift of Land should be made. If no gift of Lands is made, the Trustees might hire Lands for the purpose of the Charities, as held in *Attorney General v. Parsons* (h). The Court is always disposed to favour charitable Bequests. No Argument is admissible from the language of the fourth Codicil, for the Will not being attested by three Witnesses, that Codicil was ineffectual, and cannot for any purpose be read. The Case of the *Attorney General v. Davies* does not apply. There, was a bargain:—"If the Charity will give Lands,

(f) See *Attorney General v. Parsons*, 8 Ves. 186, and the Cases there cited.

(g) 3 Atk. 806; 2 Vez. 547.

(h) 8 Ves. 186. There was

no express decision to that effect, but it may be inferred from what the Lord Chancellor says in that case, p. 191.

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I will give the Charity so much." That was plainly within the Statute.

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Mr. Mitford, on behalf of the Crown :—

Supposing this Bequest cannot be sustained, yet, as a charitable application of the Money was intended, the Court may apply it to some other charitable purpose.

The VICE-CHANCELLOR :—

The disputed doctrine of *Lord Northington*, in the *Attorney General v. Tyndall*, has been much adverted to, but it has no application to this Case. That doctrine has not received the sanction of subsequent authorities; and the principle, if pushed to its extent, would prohibit all repair or improvement of existing Buildings.

It is now perfectly well settled, that if a Testator gives personal Property to erect and endow a School or Hospital, it must be considered, unless it be otherwise declared, that it was his intention that Land should be acquired, and Buildings made, as necessary parts of his purpose; but here, the Testator has expressly directed that no part of the Money bequeathed is to be so applied. The Testator says, "Whereas it is my wish that a Blue Coat School be erected at *Oldham*, and a Blind Asylum established at *Manchester*, under the management and direction of certain Trustees, to be hereafter appointed; I hereby give and bequeath 20,000*l.* in Trust, to the said Trustees, to each of the said Charities, subject to such Rules, Regulations and Limitations,

as shall afterwards be determined for the government thereof." If the Will had stopped there, the Bequest would have been void; but then the Testator adds these words: "*but I direct that the said Monies shall not be applied in the purchase of Lands, or the erection of Buildings, it being my expectation that other persons will, at their expense, purchase Lands and Buildings for those purposes.*" It is next argued, that it was this Testator's intention that the Charities were not to take effect until Lands or Buildings were supplied by others, and that the Money may be locked up for an indefinite period of time, and therefore, that the Bequest cannot be sustained. The Cases of *Downing College*, and the *Attorney General v. The Bishop of Chester*, seem to be Authorities against that objection; but the point does not arise here.

In his second Codicil, the Testator directs that the Money bequeathed to the Blue Coat School and to the Blind Asylum, shall continue in the Firm at *Oldham*, in conformity to and during his Articles of Partnership, and for such longer time as his Executors consider the Principal and Interest secure for the benefit of the Charities, "it being his Will, that the Interest of the said 60,000*l.* be paid annually to the Trustees of the said Charities for the Maintenance and Support thereof. The Trustees have, therefore, a Title to this annual payment from the death of the Testator, and must apply it in the Maintenance and Support of the Charities, although the expectations of the Testator, with respect to the purchase of Lands and Buildings by other persons, are wholly disappointed. In fact, these expectations seem to have failed the Testator in his life-time; for by his fourth Codicil he expresses an

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intention, not perfected, to appropriate a particular Close Close for the building of the Blue Coat School. These Charities must therefore be established, and when the accounts are taken, the particular manner of the administration of them will come to be considered.

M'CULLOCK v. COTBATCH.

23d July.

A person present at a Sale, is not permitted to open Biddings. A MOTION was made in this Cause to open Biddings by a person who was present at the Sale.

The Vice-CHANCELLOR:—

The opinion of the Court has fluctuated upon this question (a).

If the particular Interest of this Estate were to be considered, the Biddings must of course be opened; but with a view to the general benefit of Sales by the Court, I think it ought not to be permitted to a person present at the Sale to open the Biddings. If such persons were allowed to open the Biddings, the Sales by the Court would not have the full benefit of the spirit of competition.

Motion refused.

(a) *Vid. Tait v. Lord Northwick, 5 Ves. 655; Rigby v.* Macnamara, 6 Ves. 117.

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Ex parte C. COLES, in re COLES and GILPIN.

28th July.

THE object of this Petition was to expunge twenty-two debts proved under the Commission; the Debts proved by the Assignees were among those which were sought to be expunged.

On a Petition to expunge the Debt of C.D. the examination of a Witness on a former occasion

On the hearing of the Petition, a question arose, *as to a Debt whether the examination of one Skinner, a Witness sought to be examined before the Commissioners in regard to A.B., proved by A.B. who had sought to prove a Debt, could be read as Evidence in favour of the Petition; the Case of the Respondents not being under the consideration of the Commissioners, but only the Case of A.B., when the Examination of Skinner was taken.*

Mr. Agar contended the Examination could not be read.

Sir S. Romilly, contra, cited *Ex parte Campbell* (a).

The VICE-CHANCELLOR:—

These Depositions are not Evidence against the Respondents, who were no Parties to the Examination of *Skinner* under the Commission; they cannot be considered as an Affidavit in support of the Petition; because, not being made in the matter of the Petition, Perjury could not be assigned upon them. The matter material upon the Petition might have been wholly immaterial upon the Examination under the Commission. They are therefore *res inter alios acta*, without the sanction of Perjury.

(a) 2 Rose's p. 51.

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Let the Petition stand over for a week, with liberty to the Petitioner to apply to *Skinner* to make an Affidavit to the effect of what he swore under his Examination, and if he refuses to make such an Affidavit, then with liberty to procure the Affidavit of some person who attended his Examination, to depose as to what *Skinner* swore upon his Examination; and on that Affidavit the Court would, if necessary, direct an Inquiry.

ORDER OF COURT.

IT is hereby Ordered, That in future all references of Answers of Defendants for Insufficiency, or for Scandal and Impertinence, or for Impertinence, made in the same Cause, be made to the same *Master*.

10th March.

And it is further Ordered, That where Answers of Defendants have been referred for Scandal and Impertinence, or for Impertinence, and the Court shall afterwards refer the same for Insufficiency, the latter reference be made to the same *Master* as the former reference.

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ORDER OF COURT.

5th August.

WHEREAS it is expedient that the present Practice of the Court, with reference to Costs in Cases in which Notices of Motion given are abandoned, should be altered;—It is therefore hereby Ordered, That from and after the 26th day of October next, if a Party gives Notice of Motion, and does not move accordingly, he shall, when no Affidavit is filed, pay to the other side forty shillings Costs upon production of the Notice of Motion. But when an Affidavit is filed by either Party, the Party giving such Notice of Motion, and not moving, shall pay to the other side Costs, to be taxed by the *Master*, unless the Court itself shall direct, upon production of the Notice of Motion, what Sum shall be paid for Costs. And let this Order be entered with the Registrar, and fixed up in the Offices of the Six Clerks, and the Registrar of the Court.

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Between Sir SAMUEL SHEPHERD, Knight, His Ma-
jesty's Attorney General, on the relation of GEORGE
BIGGS, JOSEPH NEWCOMB, JOSIAH SCRIV-
VEN and HENRY HUGHES; and the Mayor, Bailiffs and Commonalty of the City or Town of Oxford; the Master and Wardens of the Merchant Taylors of London; the Mayor and Commonalty of the City of York; the Mayor and Commonalty of the City of Canterbury; the Mayor, Burgesses, and Commonalty of the City of West Chester; the Mayor and Burgesses of the Town of Reading; the Mayor and Burgesses of the Town and City of Gloucester; the Bailiffs, Alderman, Chamberlain, and Citizens of the Town or City of Worcester; the Mayor, Bailiffs and Commonalty of the City of Exeter; the Mayor and Commonalty of the City of Lincoln; the Mayor and Alderman of the City of Hereford; the Mayor and Commonalty of the Town of Cambridge; the Mayor and Commonalty of the City of Bath; the Bailiffs and Burgesses of the Town of Derby; and the Bailiffs and Commonalty of the Town of Ipswich; and the President and Scholars of the College of St. John Baptist, in the University of Oxford - - Plaintiffs:

And

The Mayor, Burgesses, and Commonalty of the City of Bristowe, otherwise Bristol; and JOHN Langley; the Mayor, and Commonalty of the City of Salisbury; the Mayor, Sheriffs, Citizens, and Commonalty of the City of Norwich; the Mayor, Bailiffs and Burgesses of the Town of Southampton; the Mayor and Commonalty of the City or Town of

30th Oct.
On Demurrer,
held, that the
increased value
of certain Charitable Gifts
belonged to the
Charities.

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Winchester; the Bailiffs and Commonalty of the Town of *Shrewsbury*; the Mayor and Commonalty of the Town of *Lynn*; the Bailiffs, Burgesses, and Commonalty of the Town of *Colchester*; and the Mayor and Commonalty of the Town of *Newcastle*; and Sir ROBERT GIFFORD, Knight, His Majesty's *Solicitor General* - - - - - Defendants.

THE Information and Bill stated, that Sir *Thomas White*, Knight, now deceased, who was many years ago Lord Mayor and Alderman of the City of *London*, having considerable dealings in the Woollen Manufactures of England, with and amongst all or most of the Cities, Boroughs, Towns, and Corporations hereinbefore and hereinafter mentioned, and being a Member of the said *Merchant Taylors Company*, and desirous of promoting the good of Trade, and the benefit and accommodation of the Inhabitants of said several Towns and Corporations, did, in or about the year 1566, deliver and pay to the then Mayor, Burgesses and Commonalty of said City of *Bristowe*, otherwise *Bristol*, and they accordingly received of him, of his own proper Monies, the sum of 2,000*l.* to the intent and purpose, and upon Trust, that said Mayor, Burgesses and Commonalty of said City of *Bristowe*, otherwise *Bristol*, should therewith purchase to themselves and their Successors, Messuages, Lands, Tenements, Gardens, Meadows, Pastures and Hereditaments of the then clear yearly value of 120*l.* and upwards, above all yearly Charges and Reprises; and that the said Mayor, Burgesses and Commonalty of the City of *Bristowe*, otherwise *Bristol*, should settle and hold said Estates, when so purchased, in Trust, for the equal accommodation and advancement of all such twenty-

four Cities, Boroughs, Towns, Corporations and Companies, as mentioned in the Deed or Indenture herein-after stated, and same was to be a perpetual Charity and Benevolence of said Sir *Thomas White*, for ever:—That said Mayor, Burgesses and Commonalty, of said City of *Bristowe*, otherwise *Bristol*, accordingly, upon or shortly after the receipt of said 2,000*l.*, laid out and invested, or caused to be laid out and invested, some part thereof in the purchase of divers Lands, Tenements, Gardens and other Hereditaments, situate within the said City of *Bristowe*, otherwise *Bristol*, and the Liberties of the same, and elsewhere, in the Counties of *Gloucester* and *Somerset*, and by Letters Patent, bearing date 9th July, in the thirty-fifth year of his late Majesty King Henry the Eighth, such Manors, Lands, Messuages and Premises, so purchased as last mentioned, were given and granted to said Mayor, Burgesses and Commonalty of said City of *Bristowe*, otherwise *Bristol*, and their Successors for ever; and such Manors, Lands, Messuages and Premises, were therein stated and expressed to be, as the same in fact were, of the then clear and yearly value of three-score and sixteen Pounds, as by said Letters Patent will appear:—That upon or shortly after the making of such Purchase, a certain Indenture, bearing date on or about the 1st July 1566, was duly made and executed by and between and under the Common Seal of said Mayor, Burgesses and Commonalty of the City of *Bristowe*, otherwise *Bristol*, of the one Part; and Plaintiffs, the President and Scholars of the College of *St. John Baptist*, founded in the University of *Oxford*, by said Sir *Thomas White*, Knight, and Alderman of *London*, second Part; and the Master and Wardens of the *Merchant Taylors* of the fraternity of *St. John Baptist*, in the

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City of *London*, of the Third Part: whereby it was witnessed or recited, that whereas said Mayor, Burgesses and Commonalty had received 2,000*l.* of said Sir *Thomas White*, Knight, of his Benevolence and Gift, as well for the Benefit and Commodity of said City of *Bristowe*, and Inhabitants of the same, as also for the Advancement and Commodity of other Cities and Towns therein and hereinafter expressed and specified, and to be employed to such other Uses, Purposes and Intents, as were therein and hereinafter mentioned and declared, and of which said Sum of 2,000*l.* the said Mayor, Burgesses and Commonalty, did acknowledge themselves satisfied, contented, and paid; which said Sum of Money was delivered to said Mayor, Burgesses, and Commonalty, to the intent that said Mayor, Burgesses and Commonalty should therewith purchase Land, Tenements, Gardens, Meadows, Pastures and Hereditaments, to them and their Successors, to the clear yearly value of six-score Pounds and more; and further reciting, that whereas said Mayor, Burgesses and Commonalty of *Bristowe* had obtained and purchased with part of the said Sum so by them received, to them and their Successors for ever, by said Letters Patent of the late King Henry Eighth, Lands, Tenements, Meadows, Gardens and other Hereditaments within the said City and Liberties of *Bristowe* and elsewhere, within the Counties of *Somerset* and *Glos-*
cester, to the clear yearly value of three-score and sixteen Pounds, whereupon it was thereby further covenanted, granted and agreed between said Parties to said Indenture, and said Mayor, Burgesses and Commonalty, for themselves and their Successors, did covenant and grant with said President and Scholars, and their Successors, and also with said Master and

Wardens of said *Merchant Taylors* and their Successors, and to and with every of them, that they the said Mayor, Burgesses and Commonalty, should, within four years then next ensuing, obtain and purchase to them and their Successors for ever, of a good, sure, perfect and lawful Estate and Title, Lands, Tenements and Hereditaments of the clear yearly value of six-score Pounds and more, over and above all yearly Charges and Re-prizes, with the Lands before by them purchased and assured of the late King Henry Eighth as aforesaid; which Lands, Tenements and Hereditaments of the yearly value of six-score Pounds, so to be purchased, together with the said Lands, Tenements and Hereditaments, to them already assured by said late King's Letters Patent, and paid for by the said Sir Thomas White, to amount to the clear yearly value of said six-score Pounds and more, to be employed and bestowed to and for the Uses and Intents therein and hereinafter mentioned, and that the Rents, Issues and Profits coming and growing, as well of said Lands and Tenements theretofore purchased, specified in said Letters Patent as aforesaid, as also of said Lands, Tenements and Hereditaments, therein and hereinafter to be purchased as aforesaid, should be employed, or caused to be employed by said Mayor, Burgesses and Commonalty, in manner therein and hereinafter specified, and to no other Uses, Intents or Purposes; first, said Mayor and Burgesses, and Commonalty of *Bristow*, for themselves and their Successors, did covenant and grant to and with said President and Scholars of said College and their Successors, and to and with the said Master and Wardens and their Successors, that they or their Assigns should on the *Feast of St. Martin*, in winter, in the year 1567, and so yearly thereafter on

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said feast of *St. Martin* in winter, during the term of eight years then next after, disburse and pay at *Bristowe* aforesaid, 100*l.* to the Uses therein and hereinafter mentioned, that is to say, to be delivered to two young Men of honest name and fame, being Inhabitants and Occupiers within the said City of *Bristowe*, and Free-men of same City, (Clothiers to be always preferred above all others), to be named and appointed always by the Mayor and Aldermen, and four of the Common Council of said City, said two persons to be named and appointed by the most part of them, whereof the Mayor for the time being to be one, and the most voices of the Common Council there, upon the day of their election of the said two persons; that is to say, to every of said two young Men 50*l.*, to have same by way of free Loan during the term of ten years then next ensuing the receipt thereof, without giving or paying any thing for the loan thereof, every of same two young Men putting in their sufficient Sureties or Pawn unto said Mayor, Burgesses and Commonalty, or else to the Chamberlain of said City for the time being, or by them assigned; which said Sureties or Pawn to be for the true payment of said Sum at the end of said ten years, and so at every ten years, and to receive said several Sums of said two young Men of such as should then have received same, to deliver and pay same at the Feast of *St. Martin* yearly to two other young Men of said City, Occupiers and Inhabitants within same City, and no Foreigners, that is to say, to every of them 50*l.* by way of free Loan, Clothiers to be always preferred, to occupy to their most profit, for the term of ten years then next ensuing the receipt thereof, they likewise putting in their sufficient Sureties or Pawn for the true payment thereof at the end of the said term of ten

years, and so the said order to have continuance in the said City for said 800*l.* in eight years, to be delivered for the relief of sixteen young Men within the City of *Bristowe*, from ten years to ten years, to have continuance for ever: Provided always, that he that had received any of the said sums of 100*l.* should have it no more after the end of his said ten years, but shall be yearly delivered to other Occupiers, Inhabitants and Freemen within said City, being of honest name and fame, and being no Foreigners:—And it was further covenanted and agreed, that immediately upon the receipt of every 100*l.* by them received at the end of every of said ten years of such young Men as had received same, the Mayor, Burgesses and Commonalty of same City for the time being, should deliver, or cause to be delivered, unto two other young Men of honest name and fame, Inhabitants of said City, being Freemen, Clothiers always to be preferred, said 100*l.* in said Feast of *St. Martin*; that is to say, to every of them 50*l.* a-piece, to have for the term of ten years next after the day of the delivery thereof, without paying any thing for the loan thereof, they first finding and giving Sureties unto the Mayor, Burgesses and Commonalty, or the Chamberlain of the said City, for the true payment thereof at the end of every ten years as aforesaid, to the intent that said sums might and should be disbursed to two other young Men of honest name, Inhabitants and Freemen within same City, and in same manner of delivering and discharging of 100*l.* to young Men yearly. It was agreed between said Parties to said Indenture, to continue from ten years to ten years within said City of *Bristowe*, for ever:—And further, said Mayor, Burgesses and Commonalty of said City of *Bristowe*, for them and their Successors, did cove-

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nant and grant to and with said President and Scholars of said College and their Successors, and also to and with the said Master and Wardens and their Successors and with every of them, that said Mayor, Burgesses and Commonalty of *Bristowe* and their Successors, should in the Feast of *St. Martin* the Bishop, in winter, which should be in the year 1575, disburse and pay, or cause to be paid, to the Chamberlain of *Bristowe* for the time being, and to such four discreet Men of the Common Council of said City, which the Mayor and Aldermen there, or the most part of them, should appoint the sum of 200*l.*, therewith to buy Corn to be sold again to poor people resident within said City, for their ready money, without gain or advantage to be taken for same, and at such time or times as should be most necessary and profitable, for and to the said people and at all times, and from time to time as said ready money should be received of said poor people, for the sale of said Corn, or any part thereof, in form aforesaid:—That said Money should be employed again by such four other discreet Men of said City of *Bristowe* as said Mayor and Aldermen there should name and appoint, upon the yearly and continual provision and buying of Corn, to be sold again to the poor people of said City in manner aforesaid, so that said Money should be always employed and received again by the poor of said City of *Bristowe* in form aforesaid; and so that said 200*l.* might continue in Stock, to be employed for the provision of Corn, for the relief of the poor people of said City, to have continuance for ever:—And it was further agreed by and between said Parties thereto, that they the said Mayor, Burgesses and Commonalty, and their Successors, of the Rent, Issues and Profits of said Lands purchased and to be purchased by them

after the end of said ten years, in which 1,000*l.* was to be paid, that is to say, eight years for sixteen young Men, and two years for the provision of Corn for the relief of poor people within said City of Bristow, should yearly after disburse and pay, or cause to be delivered and paid, to the City of York, and the several other Cities and Towns therein and hereinafter mentioned, the several Sums therein and hereinafter mentioned, to and for the Uses and Intents therein and hereinafter expressed; that is to say, first, in the Feast of *St. Bartholomew the Apostle*, in the year 1577, pay and deliver unto the Mayor and Commonalty of the City of York, or to their lawful Attorney, sufficiently authorized under the Common Seal of said City requiring same there, the Sum of 104*l.*, upon condition that said Mayor and Commonalty of said City of York, or their Assigns, should in the Feast of *St. Michael the Archangel*, next after the receipt thereof, disburse and pay, or cause to be delivered and paid, to four poor young Men of same City, being of honest name and fame, Occupiers and Inhabitants within said City or Town, and Freemen of same, and Clothiers to be preferred above all others, to be named and appointed by the Mayor and Aldermen, or the more part of them of said City of York for the time being, of the Sum of 100*l.*; that is to say, to every of them 25*l.*, to have and occupy same for the term of ten years then next following, to their most commodity and advantage, without any thing given, or paying for the loan of the same, so as they dwelt within said City or the Suburbs of the same, for the term of ten years next after the receipt of same, they and every of them finding to said Mayor, Aldermen and Commonalty of said City of York, sufficient Sureties or sufficient Pawn for the true repay-

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ment thereof at the end of said ten years, to the intent and upon condition that the Mayor and Commonalty of *York*, or their Assigns, should, upon receipt of said 100*l.* in the end of said ten years, deliver same 100*l.* in the Feast of *St. Michael the Archangel*, to four other poor young Men of said City, being of honest name and fame, Occupiers and Inhabitants within said City, Freemen of same, to be named and appointed as aforesaid; that is to say, to every of them 25*l.*, to have and occupy same for other ten years next ensuing the receipt thereof, they and every of them finding first sufficient Sureties or Pawn for the true repayment thereof in the end of said ten years, without any thing giving or paying for the loan thereof, and after every ten years end, same Sum of 100*l.* to be received and delivered again by said Mayor and Commonalty of the City of *York*, or their Assigns, to four other poor young Men of honest name and fame, Occupiers and Inhabitants within said City, and Freemen of same, to be named and appointed as aforesaid, to have and to occupy same for their most profit and advantage during said term of ten years next after the receipt thereof, in manner and form aforesaid, and that manner of delivery of said Sum of 100*l.* to four young Men, as was before mentioned, of said City, to occupy for ten years, and so from ten years to ten years to have continuance within said City for ever:—Provided always, that none of the four young Men that had once the benefit of occupying any of said Sums for ten years, should not be admitted to have it any more after: And further, it was covenanted and agreed between said Parties; that said 4*l.* residue of said 104*l.*, to be delivered by said Mayor, Burgessees and Commonalty of *Bristow*; to said Mayor and Commonalty of *York*, as was before mentioned,

should be employed after the receipt thereof by said Mayor and Commonalty of *York*, as to them should be thought good, for their pains to be taken in and about the receipts and payments of said 100*l.*; and said Mayor and Commonalty of *Bristow* did thereby covenant, in like manner as hereinbefore mentioned, on the Feast of *St. Bartholomew*, 1578, to pay to the Mayor and Commonalty of the City of *Canterbury* the like Sum of 104*l.*, to be applied by said City for the like purposes as aforesaid; and the like Sum, for the like purposes, to the Mayor and Burgesses of the town of *Reading*, in the year 1579; and the like Sum, for the like purposes, to Plaintiffs, the Master and Wardens of the *Merchant Taylors Company* of the City of *London*, in the year 1580; and the like Sum, for the like purposes, to Plaintiffs, the Mayor and Burgesses of the Town and City of *Gloucester*, in the year 1581; and the like Sum, for the like purposes, to Plaintiffs, the Bailiffs, Aldermen, Chamberlain and Citizens of the City of *Worcester*, in the year 1582; and the like Sum, for the like purposes, to Plaintiffs, the Mayor, Bailiffs and Commonalty of the City of *Exeter*, in the year 1583; and the like Sum, for the like purposes, to the Mayor and Commonalty of the City of *Salisbury*, in the year 1584; the like Sum, for the like purposes, to Plaintiffs, the Mayor, Burgesses and Commonalty of the City of *West Chester*, in the year 1585; and the like Sum, for the like purposes, to the Mayor, Sheriffs, Citizens and Commonalty of the City of *Norwich*, in the year 1586; and the like Sum, for the like purposes, to the Mayor, Bailiffs, Burgesses and Commonalty of the Town of *Southampton*, in the year 1587; and the like Sum, for the like purposes, to Plaintiffs, the Mayor and Commonalty of the City of *Lincoln*, in the year 1588; and the like Sum, for the like purposes, to

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the Mayor and Commonalty of the City or Town of *Winchester*, in the year 1589; and the like Sum, for the like purposes, to Plaintiffs, the Mayor and Commonalty of the City or Town of *Oxford*, in the year 1590; and the like Sum, for the like purposes, to Plaintiffs, the Mayor and Aldermen of the City of *Hereford*, in the year 1591; and the like Sum, for the like purposes, to Plaintiffs, the Mayor and Commonalty of the Town of *Cambridge*, in the year 1592; and the like Sum, for the like purposes, to the Bailiffs and Commonalty of the Town of *Shrewsbury*, in the year 1593; and the like Sum, for the like purposes, to the Mayor and Commonalty of the Town of *Lynn*, in the year 1594; and the like Sum, for the like purposes, to Plaintiffs, the Mayor and Commonalty of the City of *Bath*, in the year 1595; and the like Sum, for the like purposes, to Plaintiffs, the Bailiffs and Burgesses of the Town of *Derby*, in the year 1596; and the like Sum, for the like purposes, to Plaintiffs, the Bailiffs and Commonalty of the Town of *Ipswich*, in the year 1597; and the like Sum, for the like purposes, to the Bailiffs, Burgesses and Commonalty of the Town of *Colchester*, in the year 1598; and the like Sum, for the like purposes, to the Mayor and Commonalty of the Town of *Newcastle*, in the year 1599.—And it was thereby further covenanted between said Parties, that said Mayor, Burgesses and Commonalty of *Bristol*, and their Successors or Assigns, should on the Feast-day of *St. Martin*, in the year 1600, deliver and pay unto two other poor young Men of honest name and fame, Occupiers and Inhabitants within said City of *Bristol*, to be appointed as aforesaid, the Sum of £100*l.*, that is to say, to every of them £5*l.*, to have the same to their most profit in manner aforesaid, during the term of ten years next after the receipt thereof,

they putting in sufficient Sureties for the true repayment thereof, to the Mayor, Burgesses and Chamberlain of *Bristow*, in the end of the said ten years as aforesaid in manner aforesaid, to the intent said 100*l.* at every ten year's end, should be delivered by said Mayor, Burgesses and Commonalty of *Bristow*, to other two young Men of honest name and fame, Inhabitants within said City of *Bristow* and Freemen of same, to have the use thereof for ten years, and so from ten years to ten years, to have continuance as therein and hereinbefore mentioned; and these two poor young Men to be appointed by the Mayor, Aldermen, and four of the Common Council of said Town of *Bristow* for the time being, or the major part of them, whereof the Mayor to be one:—And it was further covenanted and agreed, that said Mayor, Burgesses and Commonalty of *Bristow*, their Successors and Assigns, after the Sums above mentioned in form aforesaid paid, should yearly on the Feast of *St. Bartholomew the Apostle*, from year to year, from thenceforth for ever, pay or cause to be paid, to every of the Cities, Company and Towns before mentioned, the one after the other as they are in now stating Indentures named and placed, and in such order as before appointed, beginning first with said City of *Bristow*, then said City of *York*, and to deliver unto the Mayor and Commonalty and other head Officers of said Cities, Company and Towns, or to their sufficiently authorized Attorneys under their Common Seal, if they should be there, or send thither the Sum of 104*l.* of the Rents and Profits of said Lands yearly arising of same, upon condition that the Mayor and other head Officers should, on the Feast of *St. Michael the Archangel* next after the receipt thereof, pay or cause to be paid the Sum of 100*l.* to four other poor young Men of honest name and fame of the said

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Cities or Towns, being Freemen of the same, to be named and appointed as aforesaid, the first four young Men appointed having the first 100*l.*, that is to say, to every of them 25*l.* to occupy to their most profit, for the term of ten years next after the receipt thereof, without paying anything for the loan thereof, so as they should continue and dwell within the same City or Town for the said term of ten years, and find sufficient Sureties to the Chamberlain, or other head officers of said Cities, Company or Towns, for the true payment thereof at the end of every of said ten years, to the intent that said 100*l.* might be again paid to four other young Men in like manner, and upon the like Terms and Conditions; and the delivering and receivnig of said 100*l.* to four poor young Men, and finding Sureties, to have continuance from time to time for ever:—And it was further covenanted and agreed, that if said Mayor, Burgesses and Commonalty of *Bristowe*, their Successors and Assigns, should fail and make default of Payment of all or any of said sums of 104*l.* above limited, to any of said Cities or Towns aforesaid, in part or in all, that then, they and their Successors should forfeit and pay to said President and Scholars, and their Successors, the several Fines and Penalties following; that is to say, for the first time of non-payment or non-delivery up of the said 104*l.* to any of the said Cities, Company or Towns, as it should be due when said Forfeiture was made, to forfeit 110*l.*; and the second time of the like Forfeiture 115*l.*, and for the third time 120*l.*, for the fourth time 130*l.*, for the fifth time 140*l.*, for the sixth time 150*l.*, and so at every time from thenceforth for ever, the Forfeiture of 150*l.* to said President and Scholars; all which said Forfeitures so from time to time made, the said Mayor, Burgesses, and Commonalty of *Bristowe* thereby covenanted and bound themselves and their Suc-

cessors to answer and pay to said President and Scholars, and their Successors and Assigns, from time to time, whenever such Forfeiture should happen: Provided always, that at any time thereafter the Rents of the Lands, Tenements and Hereditaments therein and hereinbefore specified, should be notoriously decayed by misfortune, by reason of fire or other like occasion, be lawfully evicted by order of law, and taken from the possession of the said Mayor, Burgesses and Commonalty of *Bristowe*, without fraud, and not with the negligence of said Mayor, Burgesses and Commonalty, whereby, upon declaration of account thereof, made upon the oaths of four of the Aldermen of said City of *Bristowe*, of all said decays, to the President, Vice-President, and two of the ancient Fellows of *St. John Baptist*, in the University of *Oxford*, for the time being, and the Mayor of the City of *Gloucester* aforesaid, and one of the Aldermen of the same for the time being, so as it shall truly and evidently appear to them, that the Rents and Profits of the Lands, Tenements and Hereditaments, purchased and to be purchased as aforesaid, for the purposes therein and hereinbefore specified, remaining, should not be sufficient to bear the charge before and thereafter mentioned, over and above the reparations and other charges by the judgment of the President and Vice-President, and two of the ancient Fellows and said Mayor and Aldermen of the City of *Gloucester* for the time being, or the most part of them; that then and from such time of such decay and declaration, and certificate thereof, the payment aforesaid and thereafter mentioned, touching as much as the decay should be, to cease, and not to be paid until such decay be amended: And it was thereby further covenanted and agreed that said Mayor Burgesses and Commonalty,

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and their Successors, within as convenient time as they might levy of the Profits, and Lands, Tenements and Hereditaments, so much as should be liable to supply such decays as aforesaid; that then said Mayor, Burgesses and Commonalty for the time being should employ the same Profits according to the uses in said now stating Indentures specified:—And it was further covenanted and agreed, that said President and Scholars, their Successors and Assigns, should from time to time from thenceforth, as often as any of said Forfeitures should come to their hands by the non-payment of the said 104*l.* to the head Officers of the said Towns, Company or Cities aforesaid, to whom it should be due and payable at the day, time and place aforesaid, according to the tenor of said now stating Indenture, and pay or cause to be paid to said Mayor, Burgesses and Commonalty, or other head Officers of said City, Company or Towns, to whom such default of payment was made of said 104*l.*, all the same Sum of 104*l.*, upon such conditions, uses and purposes, to be used and employed from time to time for that year, that any of said Forfeitures should come from and be in the hands of said President and Scholars and their Successors, as fully and amply in every thing as by the head Rulers and Officers of said Cities, Company and Towns aforesaid, to whom default of payment thereof should be made by the said Mayor, Burgesses and Commonalty of *Bristow* aforesaid, it should have been paid according to the true meaning of said now stating Indenture, as if no such Forfeiture or Default had been made:—And it was thereby covenanted and agreed by and between said Parties thereto, that within the term of twenty years next after the date thereof, two discreet and honest persons, one of said Town of *Bristow*, to be nominated by the Mayor, Burgesses and

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Commonalty of *Bristow*, and the other for the said College, to be nominated and appointed by the President and Scholars of said College, to ride and view, at their and each of their costs and charges, to all the Cities and Towns aforesaid, to the intent to know and enquire whether the said disbursements aforesaid be duly paid and delivered within every of said Cities, Company and Towns, as it ought to be according to the true meaning of said Sir *Thomas White*, Knight, and according to the Articles and Covenants therein and hereinbefore mentioned; and such of said Cities, Company or Towns as they should upon due proof find negligent in the true performance and execution thereof, to have the same no more, and should not have more of the said disbursement of 100*l.* ever after that; but that the same disbursement should remain and be employed and delivered to some other Town, Company or Cities more necessary, and as should be more meet for the same, as by the direction of the said Mayor, Burgesses and Commonalty of *Bristow*, and said President and Scholars for the time being, should be thought meet; Provided also, and it was thereby further covenanted and agreed by and between said Parties thereto, that at every twenty-four years end always from time to time, from and immediately after the expiration of said term of twenty years next forwards for ever, two like discreet, able and honest persons, one for said Town of *Bristow*, and the other for said College, equally to be chosen and appointed in manner aforesaid, at the like costs and charges of said Mayor, Burgesses and Commonalty of *Bristow*, and of said President and Scholars, should ride and travel to view all said Cities, Company and Towns aforesaid; and should search and know if the disbursements aforesaid were truly paid, and delivered and continued, within every of said Cities, Company and Towns, as it ought

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to be, according to the true meaning of said Sir *Thomas White*, and according to the Covenants therein and hereinbefore mentioned, and each, as they should upon proof find negligent in the true performance and execution thereof, to have no more, and should have no more of said disbursement ever after, but the same should remain, and be employed and delivered to some other Town or City as should be more meet for the same, as by the discretion of said Mayor, Burgesses and Commonalty of *Bristow*, and the said President and Scholars of said College for the time being, should think meet:— And it was thereby further covenanted and agreed by and between said Parties thereto, that said Mayor, Burgesses and Commonalty, and their Successors, should from time to time pay and disburse all said Sums in said now stating Indenture mentioned, to the Mayor and Aldermen of the City of *York*, and also to all other the Mayors, Aldermen, Burgesses and other head Officers of the Cities, Company and Towns aforesaid for ever, according to the intent and effect of said now stating Indentures; and said Mayor, Burgesses and Commonalty of *Bristow* aforesaid, for them and their Successors, covenanted and agreed, that when and as soon as all and every the twenty-four Cities, Company and Towns aforesaid should have had and received all the disbursement and sums of Money appointed to them by said now stating Indentures for the uses and purposes aforesaid, in manner aforesaid, that then said Mayor and Burgesses of *Bristow* and their Successors should begin anew again, and make payment of and with the said like Sums, of all said sums of Money aforesaid, to the several uses and purposes aforesaid, to the Cities and Towns aforesaid specified, in order as they were in said now stating Indentures placed, yearly and every year,

from year to year, from thenceforth for ever, in such order and manner as therein and hereinbefore expressed and declared, always beginning with said City of *Bristowe*, and so to run from City, Company and Towns to City, Company and Towns, to continue from time to time for ever, according to the true intent and meaning of the said now stating Indentures, and thereinafter followed, and were particularly expressed, as well all the Lands, Tenements, Gardens, Meadows, Pastures and Hereditaments situate and being within the said City and Liberty of *Bristowe* and elsewhere within the Counties of *Somerset* and *Gloucester*, as the said Mayor, Burgesses and Commonalty of *Bristowe* were then possessed and seised of, and had theretofore purchased with the Money of said Sir *Thomas White* as aforesaid, of said late King *Henry the Eighth* by his Letters Patent before specified, amounting to the yearly rent of *76l.*, as also all those new-built Houses of the yearly rent of *13l. 6s. 8d.* whereof said Mayor, Burgesses and Commonalty of *Bristowe* were also seised, and being upon the Bridge of said City of *Bristowe*, then lately by said Mayor, Burgesses and Commonalty newly built with the Monies of said Sir *Thomas White*, Knight, to them by him given for the maintenance and continuance of said Devise and use, for ever to continue, and which in the whole amounted to the yearly rent and value of l.:—That to such last stated Indenture there was affixed a Schedule describing the particulars of said Trust Estates and Premises then belonging to said Charity, and the yearly rent and value thereof, as by such last stated Indenture and Schedule thereto annexed, reference being thereunto had when produced, will appear:—That said Mayor, Burgesses and Commonalty of the said City of *Bristowe* otherwise

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Bristol, being at the time of making said last stated Deed, seized in their demesne as of fee in right of their said Corporation of and in said two then newly erected Messuages and Houses in said Indenture mentioned, and situate upon the Bridge in said City of *Bristow* otherwise *Bristol*, which were then of the aforesaid yearly value of 13*l.* 6*s.* 8*d.* and which had been built with the proper Monies of the said Sir *Thomas White*, given by him to said Mayor, Burgesses and Commonalty of said City of *Bristow* otherwise *Bristol*, also for the maintenance and continuation of the Charitable Trusts mentioned and contained in said last stated Indenture, they said last-mentioned Mayor, Burgesses and Commonalty, did by such last-mentioned Indenture, or by some other Deed or Conveyance duly executed under their Common Seal, settle and appropriate, for themselves and their Successors, said two new-built Houses, and the Rents thereof for ever, upon the same uses as said Manors, Messuages and Premises purchased by the said Mayor, Burgesses and Commonalty of *Bristow* aforesaid, were by the said hereinbefore stated Indenture settled and appropriated, and the said last-mentioned Manors, Messuages and Premises, did, at the time of the execution of the last-mentioned Deed, together with said two new-built Houses, amount in the whole to the then yearly rent and value of 89*l.* 6*s.* 8*d.* and no more:—That said Mayor, Burgesses and Commonalty of said City of *Bristow* otherwise *Bristol*, did, within a few years after the date and execution of said last stated Deed, with the remaining part of said 2,000*l.* so given unto them by said Sir *Thomas White*, for the charitable purposes aforesaid, purchase to themselves and their Successors divers other Estates, Lands, Tenements, Gardens, Meadows, Pastures and Hereditaments,

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(situate in or near said City of *Bristow*, or the Suburbs thereof or elsewhere) then of the clear yearly value and amount of $30l. 13s. 4d.$ or thereabouts, which, together with the Lands, Tenements, Gardens, Meadows, Pastures, Hereditaments, and two new-built Houses, before purchased and built by said Mayor, Burgesses and Commonalty of the City of *Bristow* otherwise *Bristol*, with the proper Monies of said Sir *Thomas White*, did at that time, and in or very shortly after the said year 1566, in the whole amount to the clear yearly Rent or Value of $120l.$ or thereabouts, over and above all yearly charges and reprizes, according to the several Covenants contained in said hereinbefore stated Indenture; and such last-mentioned Estates and Premises were afterwards and by some Deeds or Deed of Conveyance duly executed for that purpose, conveyed to or to the use of said Mayor, Burgesses and Commonalty of said City of *Bristow* otherwise *Bristol*, and by them afterwards, and by some Deeds or Deed duly executed by them for that purpose under their Common Seal, settled, conveyed and assured and appropriated to the same charitable Trusts and Purposes as said other hereinbefore mentioned Estates and Premises were so settled, conveyed and appropriated by said hereinbefore stated Deed; and said Mayor, Burgesses and Commonalty of said City of *Bristow* otherwise *Bristol*, have been ever since the time of the purchase of said last-mentioned Estates and Premises, and are now in the possession or enjoyment or in receipt, by themselves or their Agents, of the Rents and Profits thereof; and the said Mayor, Burgesses and Commonalty of said City of *Bristow* otherwise *Bristol*, have from time to time paid and advanced to Plaintiffs, and the other respective Corporations entitled to the same under said Deed, said sum of $140l.$ at the re-

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pective times and periods by said hereinbefore stated Deed provided:—That said Sir *Thomas White* departed this life in or about the month of February 1561, and he did not at the time of his death leave any Heir at Law him surviving, or, however, none such can now be found; after the most diligent search and inquiry:—That since the time of the execution of said hereinbefore stated Indenture, and the aforesaid purchase and acquisition by the said Mayor, Burgesses and Commonalty of said City of *Bristowe* otherwise *Bristol*, of the said Trust Estates and Premises, and the Rents and Profits of such Estates and Premises, have from time very greatly increased, and the same have for very many years last past amounted and do now amount to some Thousands of Pounds:—That said Mayor, Burgesses and Commonalty of said City of *Bristowe* otherwise *Bristol*, have from time to time, and during a great many years last past, been in the habit of receiving and have received, by themselves or by some persons as their Agents, from sundry persons, divers large sums of Money as or by way of Premiums or Fines, for the granting to them of divers Leases, or Renewals of Leases of said Trust Estates and Premises; and such sums of Money so received by them the said Mayor, Burgesses and Commonalty of said City of *Bristowe* otherwise *Bristol* have been of large amount, by means whereof the Profits and Revenues of said Charity or Trust Estates have been also considerably increased and enlarged: That Plaintiffs are advised, that in consequence of such Rents and Profits, and of said Trust Estates and Premises having so improved and increased as aforesaid, Plaintiffs, and the several other Corporations, Cities and Towns interested in said Charitable Donations and Bequests, have been ever since the respective periods of

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such increase of the Rents and Profits of such Trust Estates, and are now entitled, according to the true meaning and intent of said Indenture, to have the full benefit and enjoyment of all such increased Revenues, and that they were and are now entitled to be paid the said sum of 104*l.* much oftener than in such respective intervals and periods originally provided by said Deed for that purpose, or otherwise, they were and are entitled to have said original sum or payment of 104*l.* so directed by said Deed to be made to each Corporation as aforesaid, very greatly increased, or otherwise such improved Rent, Issues and Profits of said Charity Estates, ought in some manner to have been paid and delivered over to Plaintiffs and the several other Corporations named in said Deed, in order that such increased Sums or Payments might be by them respectively applied to the charitable purposes provided and directed by said Deed; but Plaintiffs shew, that instead of any increase having been made, or any additional Sums whatever having been paid to Plaintiffs and such other Corporations as aforesaid or any of them, said Mayor, Burgesses and Commonalty of *Bristow* otherwise *Bristol* aforesaid, have only invariably continued to pay Plaintiffs and such other Corporations as aforesaid, said 104*l.*, without any increase or addition whatever; and said Mayor, Burgesses and Commonalty of *Bristow* otherwise *Bristol* aforesaid, have from time to time, and ever since the respective periods of the increase of the Rents, Profits and Revenues of all said Charitable Estates, taken and applied such increased Rents and Profits and Revenues, including such Fines so received by them for the granting of such Leases or Renewals of Leases as aforesaid, to their own use and benefit, or have otherwise misapplied same, and have

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never rendered any account whatever of same, or of their application thereof, to Plaintiffs, or any other of said Corporations, or any persons or person on their or any or either of their behalves.

The *Prayer* of the Information and Bill was, That said *Attorney General* and Plaintiffs may have a fair and full Disclosure and Discovery from said Defendant *John Langley*, touching all the several matters aforesaid; and that an account may be taken, under the direction of the Court, of all the several Estates and Premises originally purchased with said sum of 2,000*l.* including said two Houses and Premises situate on the Bridge of *Bristow* otherwise *Bristol* aforesaid, and also of all other the Trust Estates, Property and Effects whatsoever, which have been purchased with, or which have arisen or been produced by or from the increased Revenues, Rents, Issues and Profits of the said Estates or Property belonging to the said Charity; and that an Account may be taken of all the Rents, Issues and Profits of all said Trust Estates and Premises, including those so originally purchased with said 2,000*l.* as aforesaid, and said two Houses on the Bridge at *Bristow* otherwise *Bristol* aforesaid, as also the Estates (if any) subsequently purchased out of such increased Rents or Revenues as aforesaid, and of all sums of Money arising from the Fines for granting of Leases or Renewals of Leases of all or any part of said Trust Estates and Premises, and also the Dividends or Interest of such parts of said Trust Property as may be invested in Government or Mortgage or other Securities, and which have been from time to time possessed or received by them said Defendants, said Mayor, Burgesses and Commonalty of said City of *Bristow* otherwise *Bristol*.

aforesaid, or by any person or persons by their order or for their use, and of the manner in which the same and every part thereof have or hath been from time to time respectively paid, applied or disposed of; and that the surplus of the Rents, Profits and Produce of all said Trust Estates, including those originally purchased with said 2,000*l.* as aforesaid, and said two Houses on the Bridge at *Bristowe* otherwise *Bristol* aforesaid, as also the Estates (if any) subsequently purchased out of such increased Rents and Revenues as aforesaid, and also such sums of Money arising from such Fines or Premiums as aforesaid, and all the Dividends and Interest of such parts of said Trust Estates and Property (if any) as may have been invested in Government or Mortgage or other Securities, over and above the particular Sums or Payment directed to be made by said Trust Deed, may be declared to belong to Plaintiffs, and all other the several Corporations and Towns mentioned in said Deed, and to be applicable to the charitable purposes provided by said Trust Deed in favour of Plaintiffs, and all the several other Corporations and Towns therein mentioned, or otherwise, to their use and benefit;—and that said Defendants, the Mayor, Burgesses and Commonalty of said City of *Bristowe* otherwise *Bristol*, may be directed to account for the same accordingly, and that proper rests may be made in the taking said Accounts; and that the said last-named Defendants may be ordered to pay and apply whatever Monies shall be found due from them on the taking of such Accounts to or for the benefit of Plaintiffs, and the other Corporations and Towns named in said Deed, and in such manner and proportions as the Court may think proper to direct; and that proper directions may be given by the Court for the future application of the increased Rents and Profits of said Trust

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Estates, according to the true meaning and intention of said Charitable Trust, in such manner as to the Court may appear proper; and that said Defendants, said Corporation of *Bristowe* otherwise *Bristol*, or said Defendant *John Langley*, as such their Chamberlain as aforesaid, may be directed to produce before such one of the Masters of the Court as shall be directed to take such Accounts as aforesaid, all the Title Deeds, Evidences and Writings, Rentals, Books, Papers and Writings whatsoever in their custody, possession or power, touching or relating to the Charitable Trust, or to the said Estates and Premises, or to their Receipts or Disbursements in respect thereof, or otherwise touching and relating to the matters aforesaid, or any of them; and that if necessary, some proper persons or person may be appointed by the Court as the Receivers or Receiver of said Trust Estates and Premises; and said *Attorney General* and Plaintiffs may have such further and other relief, and that all such necessary directions may be given for the better effectuating the matters aforesaid, as the circumstances of the case may require.

To this Information and Bill, a general Demurrer, for want of Equity, was put in by the Mayor and Burgesses and Commonalty of *Bristowe* otherwise *Bristol*, and by *John Langley*.

Mr. *Bell*, Mr. *Heald*, and Mr. *Garratt*, in support of the Demurrer :—

The Question is, Whether, according to the true construction of the Deed of the 1st July 1566, it was the intent of the Donor, that if the Rents increased, such increased Rents should be divided as the original Rents were directed to be employed? We insist, that according

to the true intent of the Deed, only a certain sum, fixed by the Deed, was to be paid by the Corporation of *Bristol* to the other Cities and Corporations, and that the Surplus was intended to belong to the Corporation of *Bristol* for its own benefit. In the Cases of *Thetford School*, (a) *Arnold v. Attorney General* (b), and the *Coventry* Case (c), and in other Cases where the increased Rents were decreed to be applied in the augmentation of the Charity, the intent of the Donor was clear that it should be so applied, but in this Case it is equally clear the increased Rents were not intended to be so applied, but that the Corporation of *Bristol* was to have them, not as Trustees, but beneficially. In all those Cases the Donor gave all the then annual Value of the Lands, or the supposed annual Value; but here, knowing the full Value, he does not give the full Value in charity, but expressly leaves a Surplus.

It is not Land that is given to the Corporation of *Bristol*, but the sum of 2,000*l.*, for the purpose of laying it out in Land, which shall produce 120*l.* and more, above all Reprizes. The Donor directs the application of 100*l.* of the Rent for ten years, and for the next ten years the sum of 104*l.* No provision is made for the trouble which the Corporation of *Bristol* must necessarily have. In the Gift to the other Corporations, 4*l.* is expressly given for their trouble; but nothing is expressly given to this Corporation for their trouble, though many onerous duties are imposed upon them. They are to visit the other Cities to see that the Trust Money paid to those Cities is properly applied. It is

(a) 8 Co. 130.

(b) *Show. P. C.* 22.

(c) 2 Vern. 397, S. C. on Appeal, 2 Bro. P. C. 236.

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probable, therefore, that the surplus Rent, after paying the 100*l.* for the first ten years, and the 120*l.* for the next ten years, was intended as a Remuneration to the Corporation of *Bristol*. Suppose they had purchased Land producing a greater Rent, at the time of the purchase, than 120*l.* a year, they would have been entitled to the surplus Rent. A provision is made in case the Rents should become less than 120*l.* a year; and there can be no doubt that if the Corporation had not been intended to have the increased Rents, a Provision would have been made for their application in favour of the Charities. The Corporation of *Bristol* appears to have been the first object of *White's Bounty*, but unless entitled to this Surplus, they would not be as much benefited as the other Cities are; they would have nothing to pay their Expenses in the execution of the Trust. At the end of thirty-three years the Corporation is directed to apply the same sum of Money as before. He must have anticipated an increase of the Rents, but still he only directs the same Payments as at first, clearly showing that he meant the Corporation should have the increased Rents. The Covenant as to Forfeiture, also proves this, for what were they to forfeit? Their trouble and expense? They would gladly forfeit that,—the loss of that could be no punishment; what was meant to be forfeited, was the Surplus, they were to enjoy, which would have been a real Forfeiture, and the only one that could have been meant. The Corporation covenanted to perform certain Trusts; they have performed them; and are entitled to the Residue after the performance of their Covenants.

Sir A. Pigott, Mr. Trower, Mr. Wetherell, Mr. Taunton, and Mr. Phillimore, in support of the Bill :—

The Money was given to the Corporation of *Bristol* upon a Trust for Charity, and the increased Rents must be considered as held by them in Trust ; and the different objects of the Charity are entitled to take in increased Proportions. Where a Donor or Devisor gives an Estate by Will or by Deed to charitable purposes, and directs a distribution, which does not absorb the whole of the Rents, the Law presumes that all the Rents and Produce were intended for charitable purposes, and applies the same accordingly ; excluding the Donee from any beneficial interest. The *Attorney General v. Arnold*, proves that it is not necessary, in Cases of Charity, to say affirmatively how a Surplus is to be disposed of, for the Law says it shall be disposed of in charity. If the Surplus be claimed by others, they must show a clear Gift to them. So, if the full amount of the Rents of Lands be given to a Charity, and the Rents afterwards increase, the increased Rents go to the Charity, as in the *Thetford School Case*, in *Attorney General v. Arnold*, and the *Attorney General v. Haberdashers Company* (d). The Case of the *Attorney General v. Mayor of Coventry* (e), is not in principle distinguishable from this. It was much considered ; the Lord Keeper *Wright*, assisted by Lord Chief Justice *Holt*, (f) Mr. Justice *Powell*, and Mr. Justice *Blencoe*, decided that the Corporation of *Coventry* were entitled to the improved Rents. Their decision went upon common law principles, and was reversed in the

(d) 4 Bro. C. C. 103; S. C. 2 Ves. jun. p. 1, by the name of Attorney General v. Tonnor. (f) At the end of this Case the Reporter has given Chief Justice Holt's Argument.

(e) 2 Vern. 397.

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House of Lords, (g) where it was held the Surplus went to Charity. That Case was much stronger than this. There, it appeared the City of *Coventry* was gone to "great ruin and decay," and there were many circumstances to induce an opinion that the Corporation was intended to be benefited. Here, it is apparent, that equal benefits were designed for the Corporation of *Bristol* and the other twenty-four Cities. There was not in the *Coventry* Case, as in this, a preliminary Declaration of Trust, that the Lands were to be applied to the Charity, and to no other purpose. It is not sufficient to say, the Corporation have performed their Covenant. In the *Coventry* Case there was a Covenant, but the mere performance of that was not considered as entitling them to the surplus Rents. The reason why the Corporation of *Bristol* was called upon to enter into a Covenant, seems to have been, because the Deed was not long after the Statute of Uses, and before the doctrine of Trusts was established, so that the only mode of securing the performance of these charitable duties, was, by means of a Covenant. No express Gift is made of the Surplus Rents and Profits, it is only by inference and implication that the Corporation of *Bristol* claims to be entitled to them. The Information states the Revenues from these Lands have increased several thousand pounds, but

(g) Lord *Harcourt*, in his MS. Tables, thus states the result of the decision in the House of Lords :—"The Reversion in Fee of divers Lands on which 70*l.* per annum was reserved, was given to the Corporation of *Coventry*, and the whole 70*l.* appointed to Charities. After the Leases expired, the Rents were greatly increased. The overplus shall be applied to the augmentation of the Charities, and not for the benefit of the Corporation. Mayor of Coventry Attorney General. 8th March 1720."

they refuse to give any Information. It is quite clear that the 2,000*l.* was advanced by *White* for a charitable purpose. The words of the Deed, in the commencement of it, are, that "the Rents, Issues and Profits of the Lands should be employed by the said Mayor, Burghesses and Commonalty, in manner and form in the Indentures specified, *and to no other Use, Intent and Purposes.*" So, the Deed provides "that if the Rents of the Lands should be notoriously decayed by a sudden misfortune, as by reason of fire or the like, and upon declaration of accounts thereof, it should be made to appear to the *President of St. John's*, and the *Mayor of Gloucester*, that the Rents of the Lands purchased *for the Uses, Purposes, Causes and Intents above specified*, should not be sufficient to bear the Charge, over and above the Reparations and other Charges, that then from such time the Payments directed by the Deed, touching as much as the decay should be, should cease and not be paid until such decay be reformed and amended." This brings the Case within the reason of the Resolution in the Case of the *Thetford School*, which went on the ground that, as if the Lands had decreased in value, the Preacher, Schoolmaster and poor People should lose; so, where the Lands increased in Value, they should gain.

The VICE-CHANCELLOR:—

The Question is,—What from this Deed is to be collected to have been the intention of the Donor Sir *Thomas White*? Sir *Thomas White* is not named a Party to the Deed, but he subscribes it, and is substantially a Party.

[*His Honor here stated the Provisions of the Deed.*] 1818.

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The Information and Bill allege that the annual Rents amount now to many thousand pounds, and that the Corporation of *Bristol*, who apply only 100*l.* of this income to Charity, and the residue to their own use, act in breach of their duty, and ought to account for the Surplus. The Demurrer, for the purpose of the Argument, admits the facts, but insists that the Corporation is not compellable to account for such surplus Rents.

The Case is new in circumstances, but not in principle; indeed, there can be no new principle. The leading Cases have been fairly stated and reasoned upon. In the *Thetford School* Case (*a*) there was an express devise of the Lands for the charitable purposes stated, and the Trustees were directed to divide the actual Rent of 70*l.* between the objects of the Charity in certain proportions. The Trustees insisted that they were Devisees of the Lands, charged only with 70*l.* a year; but it was well held, that they were to be considered as Trustees of the whole Land, and the whole Rent of the Land. The *Coventry* Case (*b*) which was upon a Charity founded also by Sir *Thomas White*, turned upon a Deed like the present. In the Deed it was declared that the Purchases of Land were made with 1,200*l.* given by *White*, and 400*l.* found by the Corporation; and the Corporation covenanted to apply to the Charities mentioned 70*l.* a year, which was then the whole existing Rent. The Lord Keeper *Wright*, and the three Judges, held, that the Corporation was entitled to the Surplus Rents, which, in the course of time, had greatly in-

(*a*) 8 Co. 130.

(*b*) 2 Vern. 397, and on Appeal, 2 Bro. P. C. 236.

creased ; on appeal, it was held, that being bound to apply the whole existing Rent at the time of the Deed, evidenced the intention that they were in all times to apply the whole actual Rent.

In the *Attorney General and Arnold* (c), the Testator directed that his Trustees should pay yearly, for ever, certain particular Sums to charitable uses, not being at the time more than half the yearly value of the Lands. The Heir claimed the Surplus as a resulting Trust for his benefit ; but the Testator having begun his Will by expressing his intention to settle all his Lands to charitable uses, it was held, that the whole Estate was fixed with such uses, and that the Court of Chancery must supply the particular application beyond the expressed intention of the Testator. The last Case of the *Attorney General v. Haberdashers Company* (d), proceeded upon the same principle.

The present Case differs from the *Thetford School* Case, and the *Coventry* Case, in this ; that the whole actual Rents and Profits were there, in the first place, applied ; but here, the Covenant is to apply only, first 100*l.* and afterwards 104*l.*, being less than the whole actual Rent of 120*l.* This Deed, however, begins with a Declaration, that the whole Rents, Issues and Profits of the Lands purchased, and to be purchased, should be applied to the uses thereafter specified, and to no other uses and purposes. Upon the whole, the question here is, Whether the Surplus Rent, not expressly appropriated, was left in the hands of the Corporation of *Bristol*, as bounty to them, or as a mean of meeting

(c) *Show. P. C. 22.*

(d) *4 Bro. C. C. 103. S. C.*

2 Ves. p. 1.

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the Expenses incident to the management of the Property, which consisted partly of Houses.

Looking at this Deed not strictly as a Deed of Covenant, which form was probably resorted to, because the jurisdiction of Equity as to Trusts was not then so well established as at present, but as a Deed of declaration of Trust by the Corporation, to Sir *Thomas White* the Founder, and attending to all the provisions of the Deed, I find in it a general purpose to apply all the Profits of the Land in the Charities mentioned. I find that the particular Sums appropriated were considered as exhausting all the Profits; and as to the small Surplus Rent, not expressly appropriated, I find no intimation of Bounty to the Trustees. My opinion therefore is, that the Corporation of *Bristol* must account for the whole Rents, after deducting all Expenses of Management.

Demurrer overruled.

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The ATTORNEY GENERAL, at the relation of the MERCHANT TAYLORS of *London*, on behalf of the Inhabitants of *Coventry*, *Northampton*, *Leicester*, *Nottingham* and *Warwick*, *v.* the MAYOR, BAILIFFS and COMMONALTY, of the City of *Coventry*.

[The following Argument of *Lord Chief Justice Holt*, in this great leading Case, on the subject of Charities, having never before been printed, will probably be acceptable to the Profession.]

LORD Chief Justice *Holt*:—"I will put it shortly, by way of Case. Monastery Lands were purchased in the 34th Henry VIII. by the City of *Coventry*, with money they had of Sir *Thomas White*, they being in value, at that time, about 70*l.* per annum; 1,400*l.* was the purchase money; 1,000*l.* of which was effectually paid by Sir *Thomas White*, as a Gift to the City; and eight years afterwards, there was 400*l.* more paid by him upon accounts made up between him and the City, and afterwards there was made this Indenture, dated 6th July 5th Edward VI., between the City of *Coventry* and the *Merchant Taylors*, which recites that the City of *Coventry* had bought, to them and their Successors, of King Henry VIII. divers Lands, of the value of, &c. as by Letters Patent, &c.; which purchase was made by the aid, &c. minding thereby to relieve and preserve the commonwealth of the City of *Coventry*, then in great ruin and decay; and that Sir *Thomas White*, of his goodness, &c. had given and paid 1,400*l.*; in consideration

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whereof, the Mayor, Bailiffs and Commonalty, &c. agree, after the decease of Sir *Thomas White*, to give, &c. and employ, &c., the particulars whereof it is not necessary to repeat; the profits of which Lands are increased to a much greater value than 70*l.* a year, being now 6 or 700*l.* a year; now the question is, whether upon this Deed, or any other evidence produced that is not contained in this Deed, the increase of the Rents, and the improvement of the Lands so purchased, upon which these Articles are made for payment of 70*l.* a year, which, whether it shall enure to the advantage of the Charity, or to the advantage of the City of *Coventry*. Now I do concur with my Brothers, that they shall not enure to the increase of the Charity, but wholly to the advantage of the City of *Coventry*. I shall in the first place consider the Deed of Articles that are made between the *Merchant Taylors* and the City of *Coventry*, 5th Edward VI., whether such a construction for the increase of this Charity can be made from those Articles alone? In the next place, I shall consider the particulars that have been given in evidence,—whether they are sufficient to make out in a Court of Equity, upon the increase of the value of the Lands, that the Charity should so too? And first, I am of opinion, that there is no construction can be made upon these Articles that are entered into by the City of *Coventry* to the *Merchant Taylors*, that there should be an increase of the Charity, or an augmentation of the respective payments upon the improvement of these Rents; for, first, it is recited in these very Articles, that the City of *Coventry* were the purchasers of these Lands, though my Brother *Powell* says, he takes Sir *Thomas White* to be the Purchaser, and not the City; but under favour, this is an averment against the Articles themselves, which created

the Charity. Now, consider at what time of day this word "Purchaser" was used, and it's not only said purchased, but bought for them; it was in the time of Edward VI. In 34th Henry VIII. was the purchase. Now, when a man does purchase and buy Lands, he does, in construction of Law and Equity, buy them to his own use. It was so before and long since the Statute. If one buys Land of another, he to whom it was sold had it to his own use, for there need no use to be declared upon the buying of it. If a man makes a bargain and sale, upon consideration of money paid, and bargain and sell to A. and his Heirs, the use is to A. and his Heirs, without any express declaration. Now, I do believe, at the time of the purchase, and also at the time of the making of the Articles, a Trust different from a Use was not thought of, I can't find then any such notion then introduced, for if you consider the 27th Henry VIII., was seven years before the purchase, and the design of that Statute was to execute Uses and Trusts into actual possession, and was intended to destroy all Uses and Trusts whatsoever, and so it was said and allowed in *Chadwick's Case*, but since, Uses have been executed in possession, the invention of Trusts came in afterwards; and I believe, at the time of the purchase, or at the time of these Articles, you will not find any Trust different from a Use. Now, when it is said that this Estate was purchased by the City of Coventry, to them and their Heirs, that they bought it and they purchased it; can it be said, that it was not to their use and advantage? And you can never enforce any Trust at that time, for, as I take it, there was no such thing at that time. Now I say, when it is mentioned and recited in the Articles, that the City of Coventry did buy and purchase these Lands to them and their Suc-

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cessors, it must be thereby understood, that it was to their sole use and benefit. Besides, it was never thought of till afterwards, that a Corporation aggregate could stand seised to a use; a sole might, but an aggregate body could not. Why? Because no Subpœna did lie against them, but since Trusts have been introduced, that notion has fallen to the ground. But I am now speaking of a Deed, which ought to be construed according to the opinion of those times, when there was no Trust different from a Use. Therefore, when it is said the City of Coventry were the buyers and purchasers of these Lands, it imports that they had them to the use of them and their Successors, and to their benefit. But then, suppose you shoud expound this Deed with such a latitude as is allowed at this day, and that the Deed was now made, and that the money was Sir *Thomas White's*, it is not said that he laid out the money in the purchase, but that he gave the money to the City of Coventry; so then, if he gives it to them, it is theirs. And if I give a man 1,000*l.* to buy Lands, 'tis his money, and if he lays it out and buys Land, can any say there is any Trust? It is contrary to the nature of the thing. They have bought and purchased these Lands; Sir *Thomas White* gives them 1,400*l.* to make the purchase; though the money was Sir *Thomas White's* originally, yet it was theirs at the time of the purchase. In the third place, when this purchase was made, it does appear that the purchase was not made for the sake of this Charity, but for some other use, that is, to the Corporation; what use it was for, or what agreement was made between Sir *Thomas White* and the Corporation does not appear. But one thing is plainly expressed: it was for the relief of the City, which was gone to ruin and decay; and it was a charity and kindness that Sir

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Thomas White did at that time, to repair the broken estate of the City, and to advantage their wealth and prosperity; therefore Sir *Thomas White* having given them 1,400*l.* to make this purchase, to repair the broken and decayed estate of the City,—what then? In consideration therefore, that he had been so kind, they erect this Charity, and covenant with the *Merchant Taylors Company* to pay those several charges, which amount to 70*l.* a year, and it appears to be done at the instance, and by the importunity of Sir *Thomas White* and his friends. In the fourth place, the Articles themselves do import the City of *Coventry* to be the absolute Owners of the Estate, discharged from any Trust; for otherwise, if they were not the Owners, but Trustees for Sir *Thomas White* and his Heirs, it had been necessary for Sir *Thomas White* to have joined in the raising of this Charity, and in charging this Estate with 70*l.* a year, if it was to be done. Now, if any one as a Trustee was seized of Lands in fee, in Trust for another and his Heirs, and a Charity was to be settled charged on such Lands, nobody now would venture to do it, unless *Cestui que* Trust joined in the settling of that Charity, and the declaring of it; so that if Sir *Thomas White* had any control over this Estate, and the City of *Coventry* were not the absolute Owners, then surely, it would have been advised that Sir *Thomas White* should have joined in declaring the payment of this 70*l.* a year which was given to the Charity; and when he is not joined, though it appears he desired the thing, and they are the persons only that say 70*l.* a year shall be paid to such Charity, that shews them to be the absolute Owners of the Estate in Equity, as well as in Law; otherwise, there would be a defect of power in the Article. Fifthly, Admitting Sir *Thomas White* had joined, and they were in this Case chargeable as

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Trustees, it is impossible, by construction from the Deed, to enlarge the sum above $70 l.$ a year; first, because the Land itself is not given, only such sums of Money amounting to $70 l.$ a year and no more; and that is given out of the Profits of the Lands; and there is a manifest difference between the charging of the Lands with the Charity, and the charging of the Land with the payment of a certain sum of Money to be disposed of in a Charity; for where the Land itself is disposed to the Charity, let the value be what it will, be it more or be it less, the Charity shall have all the Profits issuing out of the Lands, and since they are to have the profitable Land of what value it will, they run the hazard, be it more or be it less. But where the Land is not given to Charity, but a sum issuing out of the Land, and the Land itself is no further charged than with such a sum, if the Profits of the Lands increase, yet the sum bestowed on the Charity shall not. There has been mentioned the Case of *Thetford School*, and my Brother *Powell* endeavoured to make a difference between that and this. I confess I know there is a difference, and a great one, upon the distinction I have made. I will put the Case at large:—A man seised of Lands of the value of $35 l.$ per year, and no more, conveys this Land to divers Trustees, for the benefit of a *Free School*, so much to the Minister, and so much to the Scholmaster and Usher, and so much to four poor people, which in the whole did amount to the value of the Land as that time it was. Why in process of time these Lands so disposed of were increased to the value of $100 l.$ a year, and the question was, whether or no the Charity should be increased, and it was held it should, and what was the reason of it? Why, the reason was, because the Lands were disposed of to the Charity, and no sum

certain out of the Land, but the Land itself was given, and there is no limitation of any particular sum, and his saying afterwards so much shall be paid to the Minister, and so much shall be paid to the Schoolmaster, that does not go by way of restriction, but only by way of direction in what proportion the Profits of the Lands shall be applied to the payment of these people. If a man dispose of Lands, the value of 100*l.* a year, to Charity, and afterwards say that 50*l.* a year shall be distributed in such a manner, no doubt the whole Profits of the Lands shall go to the Charity; for the videlicet, though under the Profits of the Lands, shall not diminish the Charity, for if a man should grant Lands to such a use, videlicet, 20*l.* a year, out of the Lands, that is repugnant, and contradicts the Grant before. Now is here no more than a gross sum of 70*l.* a year given by this Deed for the maintenance of this Charity, and to be distributed in such manner as is mentioned in the Deed. Suppose Sir *Thomas White* was out of the case, and we should consider this as a legal Charity;—suppose the Mayor, Bailiffs, and Commonalty of *Coventry*, had granted a Rent of 70*l.* a year to the *Merchant Taylors Company*, to this Charity, to be disposed in such manner,—surely no body would say that they could pretend to have a farthing more than 70*l.* a year, the Lands were improved, and no more is here,—it is so in Law, and I take it that Equity shall never extend a man's Grant beyond the natural import of it. I would know by what rule, justice or reason, you can make this a greater Sum than what he gives? A man charges his Land with 70*l.* a year, and you will make such a construction as to charge it with 5 or 600*l.* a year. Now I think if it was by way of the Grant of a Rent, there could be no colour of it.

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Now see if there will be any alteration of the Case by the manner of this charge. 'Tis not by the Grant of a Rent, but it is by Articles of Agreement. It appears by 43d of this Queen, that directs the issuing forth of Commissions, to require of Lands given to Charitable Uses, that the Parliament did think there then wanted a sufficient remedy to compel the execution of Trusts, for at that time Trusts were rather left to the consciences of men, than under the power and jurisdiction of the Prince. But, however, since that, Equity can relieve. That Statute directs particular methods; but now, Suits are commenced originally here. The legal security, in this Case, are the Articles of Agreement, which did not at first affect the Land. And if there had been a distribution of this Money, as mentioned in the Articles, which would have been a full performance of the Articles, could not that have discharged them in Law? Certainly, it would have discharged them in Law; but it is come to pass, that though these Articles are not a legal, yet they are an equitable Charge; but you will construe this equitable Charge in the same manner as if it was a legal, you will not in Equity make it more than if it were a Rent-charge at law, that would be a hard thing for you that imitate the law; if you imitate it in part, you ought to do it in the whole. Besides, this construction has been made upon the Statute of Superstitious Uses, as it does appear in *Adams and Lambert's Case, Co. Rep.* fol. 110. There, this difference is taken; Lands of the value of 20*l.* a year are conveyed to Trustees, and that is for the payment of 10*l.* a year appointed to be paid to a Priest for praying for his soul, and there is no other limitation there. There the question was, whether all the Lands should go to the Crown. It was held all should. Why? Because, by express words before the whole

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Land is given to the superstitious Use, and he coming afterwards, and saying that 10*l.* a year should be paid to the Priest, that does not restrain the extent of the former gift; but then suppose the Land had been given to another, to the intent to pay 10*l.* out of it, and he gives that 10*l.* a year to a Priest, and the Land is of the value of 20*l.* a year; there, no more than 10*l.* a year shall go to the Crown by the Statute of Superstitious Uses, because the Land is given to another with an intent to pay 10*l.* a year to a superstitious Use. But where the Land itself is given, though but 10*l.* a year directed to be paid, the whole Land shall go to the Crown, so that there is a great difference between charging the Land with a certain sum, and giving the Land itself to such purpose. If a man does give the Land itself to such uses, though the certain sum directed to be paid is not near the value of the Land, yet if the Land improve, the whole Land shall go; but in case a man have Land of 40*l.* a year, and he does grant a rent-charge of 40*l.* a year to charitable uses, and this Land afterwards increases to 100*l.* a year, the grantees shall have no more than 40*l.* a year, and there is a clear reason for it, which is this; though 40*l.* a year is about the value of the Land at that time, yet when he does not think fit to dispose of the Land, but charge it with 40*l.* a year, it should be presumed that he had a prospect that the Land would improve (especially if it does accordingly do so); and he designed to have the benefit of that improvement for otherwise he would have given the Land itself. Now, in the Case of *Thetford School* the Land is given. And so in the Case of *Sutton Colfield*. A man seised of Land of 3*l.* a year, does convey it for the maintenance of a Schoolmaster and there are ex-

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press words that the Schoolmaster shall have 3*l.* a year, and the Lands afterwards increase to 10*l.* a year, and it was held that the Schoolmaster should have 10*l.* a year, notwithstanding those words, that there should only be paid to the Schoolmaster 3*l.* a year, for that is more than to say, the value being no more at that time; but he had himself disposed of the Land. But in this Case the Lands are not, but only a charge laid upon them. It may be objected there is a Case in a Book that has divers Cases of Charitable Uses, (711 *Gering and Hasting's Cases.*) A man seised of Lands, let at that time at 10*l.* per annum, and devises the Rent for maintenance of the Poor; the Heir at Law does pay the 10*l.* a year, and demises the Land for 40*l.* a year; the question was, whether the Charity should be increased to 40*l.* a year. And it was held it should; but what is the reason? because by the devise of the Rents the Lands themselves did pass; and it was so adjudged before that time, in a case that did not concern Charity, 2 Cro. 104, *Kerry v. Derrick*; and it is not said, only the present Rent, but all the Rent; and for that reason it was held so in that Case, because the devise did convey and pass the Lands, and therefore the Charity should be increased. But where the Land is not given there is no Case; nor does there appear any reason to me why the Charity should increase; so that that was the first matter I proposed to consider, that is, the construction of this Deed—whether any can be made, as it is presumed the Charity should be increased. I shall now come, in the next place, to consider the particular evidence that hath been given to induce this Court to believe, that it was always intended and designed that this Land.

should be wholly at the disposal of Sir *Thomas White*; and that he was *Cestui que Trust*; and so, in consequence, he having a design for bestowing the whole value of the Land to this Charity, whether it can be construed by this Deed that Sir *Thomas White* was *Cestui que Trust* of these Lands; and whether, by any thing that appears, the Land should enure to any other Trust, or any other Charity, or the increase of this Charity above 70*l.* a year. And I hold, that when the Deed is produced, whereby this Charity is created, no evidence whatsoever contrary to the Deed ought to be admitted; for where there is a Deed, you ought to be confined solely to that Deed; and it ought to be expounded by itself, or something of an equal nature, and no evidence without the Deed ought to be admitted; for if so, it will contain the greatest confusion that can be in human affairs; for when a Deed is made by advice of Counsel, to admit of any reference without the Deed is to give room for any sort of interrogation—would be the most dangerous thing to all mens title that can be. Now this Deed does not import any Trust for Sir *Thomas White*, nor any intent in the City of *Coventry* that this Charity should be increased; and there is no evidence of any transaction, or passage that happened before or after the Deed, that ought to be admitted, for the Deed is the very title that creates the Charity:—the Charity derives its very being from the Deed; and to construe itself otherwise than may be collected from the Deed itself is to destroy the very Deed upon which the Charity rises. And I think what I say on this matter is well grounded upon 7th Rep. 42, *Beresford's Case*. There, a Father covenants to stand seised to the use of his Son: Though there might be a real ground of that

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Deed from natural affection, yet a sum of money being mentioned as the consideration, it shall not be intended to pass upon any other account than what is mentioned in the Deed; for not saying, for divers other considerations, he was confined to the consideration mentioned in the Deed, and says in that case you shall not give any other evidence to make it appear that the Father made this Deed out of natural affection. This I think, in point of law, is pretty certain; how far it will obtain in equity I cannot tell; but I think it reasonable in equity too. But if you will admit of other evidence to prove that it was Sir *Thomas White's* intention, or the City of *Coventry's* intention, that this Charity should be enlarged as the rent and value of the lands increased, shall take those things that seem most material into consideration, and they seem to be these five—
1st, They say it appears by the articles that the Money was Sir *Thomas White's*; and that after the Purchase made, the Corporation did account to Sir *Thos. White*:
2d, It hath been mentioned, and that hath given my Brother *Powell* occasion to say, that he reckoned Sir *Thomas White* the Purchaser, because it is mentioned in the books of the Corporation that these Lands were Sir *Thomas White's* Lands; and their own entries are, that Sir *Thomas White* was the Owner and Proprietor of these Lands: 3d, That Sir *Thomas White's* letter to the City of *Coventry* is a plain manifestation that he had a disposing power over the Lands; for he writes to give 46*l.* per annum to his Wife after his death, which implies, 1st. That Sir *Thomas White* was to have it for his Life; 2dly, That he had a power to direct how it should be disposed of after his death: 3dly, That Sir *Thomas White* insists in his letter that the City of *Coventry*

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might well comply with his desire in granting 46*l.* a year to his Wife after his death, because the Lands were come into their hands, and were improved, and yet he had permitted them to receive the profits of those Rents: 4thly, That these profits of Sir *Thomas White's* Lands are not brought to the account of the Town, and therefore it must be looked upon that they themselves had an apprehension of bringing those profits to account; that they would have had a discovery. As to the first, that it was Sir *Thomas White's* Money, and therefore a Trust, it is very strange, as I said at first, that when it is mentioned that they bought and purchased these Lands, and Sir *Thomas White* gave the Money, that they must, by construction of law, raise a Trust to Sir *Thomas White*. I was saying before, that I believe they had no notion of a Trust at that time different from a Use. I am sure they had not, because Sir *Thomas White* gives Money to the Corporation. Will you expound any Gift to be a Trust for the benefit of the giver? Surely, make what construction you will of it, if it was at this day upon the Statute of Frauds and Perjuries, I do not think if this Deed was made at this day this would be a Trust by operation of Law; that is, if it was expressed in consideration of Money paid by *B.* which was given by *A.* to *B.* would this make a Trust in operation of Law? Now that which I always took to be the Law, but must submit to better judgment, is, that if it be mentioned, in consideration of Money paid by *A.* a conveyance is made to *B.* and his Heirs, there it appearing the Money was *A's.* a Trust will arise; but if it was mentioned that the Money was paid by *B.* though it was given by *A.*, I do not think you shall aver it was *A's.* Money, and so the-

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Trust to *A.*; that would be to destroy the Deed itself; but if it appears by the writing it was *A.*'s Money, paid by *B.*, it will be in Trust for *A.*; but if *A.* gives *B* Money, you must take it as a Charitable Gift and disposition to *B.*; the very purchase shows they were improvable Lands, as has been said by my Brothers; for would anybody give for the best land in *England*, when money was 10*l.* per-cent., twenty years purchase. A man may as well give forty years purchase at this day; it is not evident from the nature of the thing, that it was foreseen that the Lands would be improved, and yet it is plain by this agreement that Sir *Thomas White* was contented with a charge upon them of 70*l.* a-year, even upon this very land; and the exception of improvement is made good since, for it is at least 500*l.* a-year. The second thing that is urged is, that it is mentioned in their books as Sir *Thomas White's* Lands. Why? Sir *Thos. White* was the Donor; he advanced the 1,000*l.* that was part of the Purchase Money; and it seems upon the accounts between them, he taking but half the Interest, they were looked upon as Sir *Thomas White's* Lands; their entry in their books show who was their Benefactor; it was so far an act of gratitude; but this does not ascertain the Ownership or Interest to be in Sir *Thomas White*; but to distinguish these Lands from other Lands. It is as much as to say, these Lands were purchased from the Crown by the assistance and the Money given by Sir *Thomas White*; but that does not amount to a declaration of Trust. Then as to the third thing, as to Sir *Thomas White's* letter to the City; sure no use can be made of that to the advantage of the Charity, but rather the contrary. Consider the nature of it; it was a soliciting, or importuning letter.

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wrote by Sir *Thomas White* himself. Can that be evidence against the Corporation? Say they, he requires such and such things to be done, and therefore sure he must have a power of disposing of the Estate, otherwise he would not have wrote such a letter. No such inference can be made, but the contrary; for when he writes to them, and requests and importunes them to make a Settlement of 46*l.* a-year for increasing his Wife's Jointure after his death, he does allow them to be the Owners. He admits that they had at that time such a power of disposing of the Estate; and if he had a power in Equity, he might have forced them to it. In the next place, he takes notice the Lands were improved four times the value since they were bought; and that he had suffered them to take the profits for twenty or twenty-one years, is as great an evidence against Sir *Thomas White* as can be; for had he right to more than 70*l.* a-year why did he suffer them to take the profits of the improved Lands for so long a time? But indeed they did not think themselves to be under the power of Sir *Thomas White*; and, as my Brother *Powell* says, that it was but a small thing for them to do, considering the prospect of the improvement of these Lands to make the 24*l.* a-year, settled before, 46*l.* a-year after his decease; and they were ungrateful people; they did not yet however; they insisted on their rights; and they would, notwithstanding the importunity of the *Master of the Rolls*, that was Executor with his Wife, they would not go from the original intention of the Articles; therefore, I say the letter, so far from being evidence to make out a Trust for Sir *Thomas White*, that it is the greatest evidence a thing of that nature is capable of to the contrary—that it was

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not a Trust. Then as to the fourth thing, that is, that the profits of these Lands are not brought to account in the Town Books. I think it appears quite otherwise, for they are entered in the Town Books, and it appears how from time to time the Revenue has been disposed of. It is true, they did, as most Corporations, let good bargains to one another, especially where they were certain popular men in the Town, some of the Aldermen, and some others of their friends; but however, it appears that all things have been brought to account and entered in the Town Books, these as well as other Lands that belonged to the Corporation; so that I do think there is nothing appears, out of the Deed, upon any Evidence that hath been given, that will be sufficient in this Case to give any ground for any such construction, that this Charity ought to be improved. I have but two reasons more upon the whole matter. One is, that of my Brother *Blencow's*, the length of time, which goes a great way; for, as my Brother says, since Sir *Thomas White* died it is one hundred and thirty years, and this Corporation has enjoyed this Estate ever since. Now my Brother *Powell* does not approve of this reason; for, says he, there is no Statute of Limitations run against a Charity; no, it is true; but I believe my Brother *Blencow* did not mean it upon that account. I do agree there is no Statute of Limitation shall bar a Charity but in a thing that is obscure and dark; and there hath been an enjoyment for a long time:—I think an enjoyment for a long time without interruption is a great evidence of a right; for quiet enjoyment for a long time does presume a rightful enjoyment; and nothing has been done to impeach till it within these seven years. I do agree, that if the Deed had declared in express

terms that these very Lands had been given to this charitable use, although there had been an enjoyment to the contrary to this Deed, I should not have mattered it, but have determined it according to the express words of the Deed; because the Deed would have showed what was disposed of to Charity, that is the Land itself; and then all the profits disposed of contrary to the words of the Deed ought to be accounted for, but the Deed is otherwise; that does only charge the Land with 70*l.* a-year; so that I do think length of time in a matter that is dark, to be very considerable, especially when what Agreement, what Terms Sir *Thomas White* and the City of *Coventry* might be upon at the time of the Purchase, does not appear, and when there hath been a long enjoyment, and it does not appear that the right is to the contrary. I think all Law and Equity ought to determine with the enjoyment. The next thing is the Account given in 1618. The *Merchant Taylors* were the Visitors, and they sent down to the City of *Coventry* to have a Visitation, and it seems then the Judges were in their Circuits, and all things were agreed to be well, though no more was disposed than 70*l.* a-year, and it was impossible for them to be ignorant of the increase of the value of the Lands both from the nature of the thing and from the common observation, and a certificate was made that the Charity was duly performed in such manner as the Deed directs, and all was well, and all was at rest till within these seven years; therefore, truly, upon the whole matter, I look upon it that by the Deed it is manifest and plain that nothing was intended for this Charity but 70*l.* a-year, the land not being charged with more; and that nothing being given to the Charity,

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I think nothing ought to be given in evidence to control or construe the Deed but what arises from the Deed; but if other Evidence was to be admitted, I think there is no other Evidence in this Case. And therefore, to conclude, my Opinion is,—That the Charity ought not to be increased, by reason these Lands are improved, to above 70*l.* a-year."

HILL v. UNETT.

LOXLEY v. HILL.

7th Nov.

A Witness to a Deed must not only prove his own attestation, but also the execution of the Deed by the Person executing the Deed.

IN these Causes a question arose, whether the evidence of a Witness as to his own hand-writing to the attestation of a Deed was sufficient; or whether he ought not also to have proved the hand-writing of the Person executing the Deed

The Vice-Chancellor was of opinion, that if a Witness is dead, it is only necessary to prove the hand-writing of the Witness (*a*); but when the Witness is alive, he

(*a*) Peake on Evidence, 107, 4th Ed. In *Wallis v. Delancy*, 7 T. R. 266, n. Lord Kenyon thought it necessary, when the Witness was dead, that the hand-writing of the Party to

the Deed should be proved, as well as the hand-writing of the subscribing Witness; but in *Gough v. Cecil*, C. B. Trin. 24 Geo. III. particularly mentioned in *Selwyn's Nisi Prius*,

must not only prove his own hand-writing as Witness, but that he must also prove the hand-writing of the Person who executed the Deed (*b*).

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Ex parte RANKEN.

ON this Petition, the *Vice-Chancellor* said, that when, 9th November, a Petition to supersede a Commission is presented by a Bankrupt, and an Issue is directed, the Court will order the Petition to stand over until such a fixed time as in all probability the Issue will be tried; and that if from any circumstance the Trial at Law does not take place within the prefixed period, the Bankrupt must make an affidavit satisfactorily accounting for the delay of the Trial, otherwise his Petition will be dismissed (*a*).

1 vol. 516, n. it appears to have been solemnly decided otherwise; and see what *Buller* says in *Adam v. Ker*, 1 Bos. and Pull. 361, and as Mr. *Selwyn* observes, "the same doctrine may be inferred from *Cynliffe v. Seston*, 2 East 183, and *Prince v. Blackburne*, 2 East 240."

(*b*) It is not only necessary that the testimony of a Witness to a Deed should prove his own hand-writing as Witness, and

the execution of the Deed by the Party to it, but at Law it has been held such Witness alone is competent to prove the execution; and that a confession or acknowledgment of the Party executing the Deed will not dispense with this testimony. *Abbott v. Plumbe*, Doug. 215.

(*a*) The same doctrine was repeated by the *Vice-Chancellor* in *ex parte Phillips*, 1 February 1819.

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9th November.

*Equitable
Mortgagee by a
deposit of Deeds,
with a writing
expressing the
terms of the De-
posit, is entitled,
on a Petition on
Bankruptcy,
for a Sale, to
have his Costs
out of the pro-
duce of the mort-
gaged Property.*

Ex parte TREW.

THIS was the usual Petition for a Sale by an Equitable Mortgagee, who had a writing, expressing the terms upon which the deposit of Deeds was made; and the question was, Whether such Mortgagee was to pay the Costs of the Petition, or whether they were to be paid out of the produce of the Sale of the mortgaged Property?

The Case *Ex parte Brightens* (a) was mentioned, in which the Agreement to Mortgage was in writing, and the Mortgagee was held entitled to his Costs; but it was said, that in a like subsequent Case, *ex parte Harris*, August 13th, 1818, Brightens' Case was quoted, but the Lord Chancellor refused to give the Mortgagee his Costs.

The VICE-CHANCELLOR:—

Where the equitable Mortgage is not evidenced by writing, it is fit that the Mortgagee should bear the Expenses of asserting his Title in a Court of Justice. The rule is otherwise, where he has had the precaution to take a written Memorandum. This is the effect of the Lord Chancellor's general Order in these Cases. Let the Petitioner have his Costs out of the mortgaged Property.

(a) 1 Swanston, 3.

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*Ex parte GOODMAN the Younger in re GOODMAN
the Elder.*

9th November.

THE Bankrupt, previous to the Commission issued against him, 4th February 1818, was indebted to the Petitioner in 1,900*l.* for Goods sold, in respect of which he gave a Bill for 400*l.* and a Promissory Note for the remaining 1,500*l.* dated in September 1813, and made payable on demand, with Interest for the remaining 1,500*l.* As a further Security for the 1,500*l.* three persons, on the 8th September 1813, assigned their remaining Interests after a Tenancy for Life in certain Copyhold Premises to a Trustee in Trust, out of the Monies produced by a Sale of the Estates after the death of the Tenant for Life, to pay what was due on the Note for 1,500*l.* and the Interest. The Note for 1,500*l.* and Interest, was not paid to the Petitioner, either by the Bankrupt or the Trustee of the Copyhold Property, the Tenant for Life being still living; and the Petitioner applied to prove to that amount, and the Interest due under the Commission, and offered to give up the Bankrupt's Note for the 1,500*l.* and Interest, but the Commissioners refused to allow such proof unless the Petitioner gave up the assignment of the Interest in the Copyhold Premises. The *Prayer* of Petition was, that the Petitioner might be allowed to prove his debt without giving up the Assignment.

*Bankrupt,
previous to
the Commission
against him, pro-
cured persons to
assign an In-
terest in Copy-
hold Premises as
a Security to a
Creditor of his.
The Creditor
may prove under
the Commission,
without deliver-
ing up such
Security.*

The Petition was supported by the Affidavit of the Bankrupt and his Attorney, verifying the facts stated in the Petition.

Mr. Newland for the Petition.

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*Ex parte
GOODMAN
in re
GOODMAN.*

The VICE-CHANCELLOR:—

The Assignment by these three Persons was merely as Sureties for the Bankrupt, the Petitioner, therefore, is not bound to deliver up that Assignment to entitle him to prove his debt. The Petitioner may get what he can out of the Bankrupt's Estate, and proceed upon the Security to recover the remainder. The Sureties have an equity that he should first prove his Debt. Let the *Prayer* of the Petition be granted.

10th November.

MILNES v. DAVISON.

*Answer stat-
ing a Tender of
Tithes before
Bill filed, but
not proved, will
not save Costs.*

THIS was a Bill for the recovery of Tithes. The Defendant, by his Answer, admitted he had at one time refused to pay, but that before the Bill was filed he offered to pay what was claimed.

The only question made was as to Costs.

Mr. Cooper, for the Defendant, contended, that having offered to pay the Tithes before the Bill was filed, the Defendant ought not to pay the Costs.

Mr. Bell, contra.

The VICE-CHANCELLOR:—

If you had distinctly stated in the Answer, and proved, that previous to the Bill being filed you had rendered an Account of the Tithes due; your readiness to correct the Account if wrong; and that you were ready to pay what was due; or, if after the Bill filed,

you had tendered what was due, and the Costs of the Suit up to the time of the Tender, and proved such Tender of Tithes and Costs, I should not make you pay Costs. This has not been done. Merely stating a Tender in the Answer is not sufficient to save Costs; it must be proved.

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MILNES
v.
DAVISON.

Between the Honourable THOMAS BOWES, Plaintiff,
And

The Company of Proprietors of the East London Water-works; THOMAS KING, Esq. Treasurer of the London Dock Company, and JOHN OSBORNE and JOHN BURT Defendants.

By Original Amended and Supplemental Bills.

MARY BOWES, Widow, by her Will, dated the 6th April 1777, gave her Freehold Property, subject to a term of 99 years (since determined), to the use of the Honourable G. Bowes (since deceased), for Life, with

10th November.
Trustees having power to make Leases in Possession, until Cestui que Trust

attained twenty-one, granted a Lease in Reversion, and another Lease after the Cestui que Trust attained twenty-one; such Leases held to be bad; and that being granted by Trustees, they could not take effect out of their absolute legal Estate in the Premises; and that the receipt of Rent by the Cestui que Trust for several years after he attained twenty-one, he being ignorant of the defects in the Leases, did not operate as a new Agreement; but as the Plaintiff had neglected to look into his rights, and the Lessees might have expended Money on the Premises, no Account directed beyond the filing of the Bill, and no Costs given to the Plaintiff.

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remainder to *Mary Lambton* and her Heirs during her Life, upon Trust, to preserve Contingent Remainders, with Remainder to the first and other Sons of *G. Bowes* in Tail Male (which Estates determined upon the decease of *G. Bowes* without Issue Male), with remainder to the use of Testatrix's Grandson, the Plaintiff *Thomas Bowes*, and his Assigns for Life, without Impeachment of Waste, with Remainders over; and the Testatrix declared, that in case the Plaintiff, or any Issue Male of him, should at any time thereafter by virtue of the Will of the Testatrix's late Husband *G. Bowes* deceased, come into and be in the actual possession of or entitled to the Hereditaments thereby settled (which event hath not happened), then the limitations in favour of the Plaintiff should cease as if he were naturally dead. The Testatrix also, amongst other property, gave all her Leasehold Estates, as well for Lives as for Years, unto *John Ord* and *Joseph Planta*, their Heirs, Executors, Administrators and Assigns, upon Trust, by and out of the Rents, Issues and Profits, to pay the Rents and perform the Covenants contained in the Leases, and to renew the same as often as occasion should require, and for that purpose to make such Remainders of the subsisting Leases as should be requisite, and, subject thereto, to permit and suffer the yearly Rents, Issues and Profits, to be received by such Person and Persons respectively as should from time to time be entitled to the Testatrix's Freehold Hereditaments, or to the Rents and Profits thereof, as far as the Law would permit; and the Testatrix gave a power to the Trustees enabling them, or the Survivor of them, and the Executors and Administrators of such Survivor, from time to time, until some one of the Testatrix's Grand Children in the Will mentioned, should attain

twenty-one, and be entitled in possession to the devised Estate, to demise or lease her said Freehold and Leasehold Estates to any Person or Persons for any term of years in possession and not in reversion, reserving the best and most improved Rents that could be had or gotten for the same, without taking any Fine, Premium or Foregift for the making thereof; and the Testatrix appointed *Ord* and *Planta* Executors of her Will. *Mary Bowes* died in 1781, and her Will was proved by the Executors.

On the 20th December 1786, a Lease was granted by *Ord* and *Planta* to the Governor and Company of the Water-works and Water-house in *Shadwell*, of certain parts of the Leasehold Estates, to hold from *Christmas Day then next* for thirty-three years, at the yearly Rent of 10*l.*

George Bowes (since deceased) attained twenty-one on the 17th November 1792.

On the 1st March 1798, the Trustees *Ord* and *Planta* granted another Lease for thirty-four years to the said Governor and Company, of other parts of the Leasehold Premises, to hold from the *Christmas preceding* for thirty-four years, at the yearly Rent of 17*l.*

George Bowes died (as before mentioned) without Issue on the 30th December 1816, whereby the Plaintiff became entitled to the Equitable Estate and Interest in the Leasehold Premises for his life.

By an Act of Parliament, 52 Geo. III., *John Osborn* and *John Burt* (two of the Defendants) were appointed

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Trustees of the Leasehold Premises in the stead of *Ord* and *Planta*, and to act in the Trusts of the Will in manner therein mentioned.

By another Act, 39 and 40 Geo. III, and by virtue of an Assignment in pursuance of the same, from the Governor and Company of the Water-works and Water-houses in *Shadwell* to the *London Dock* Company, the former set over and assigned unto the latter all the Premises comprised in the two before mentioned Indentures of Lease, for the residue of the two several Terms of thirty-three and thirty-four years.

By another Act, 48 Geo. III, and by an Assignment in pursuance of the same, from the *London Dock* Company to the Company of Proprietors of the *East London* Water-works, all the Premises comprised in the two Indentures of Lease were assigned and conveyed to the latter for the residue of the Terms of thirty-three and thirty-four years.

The Plaintiff, by his Bill stating these facts, insisted that *Ord* and *Planta* were not authorized, under the Powers contained in the Testatrix's Will, to grant the Lease of the 20th December 1786, the same being granted to take effect in Reversion, and a Fine or Premium being paid to the Trustees (*a*); and also that when *Ord* and *Planta* granted the Lease of 1st March 1798, *George Bowes* had attained twenty-one, and the power vested in them to grant Leases had ceased, and by reason thereof, and of the Fine paid (*b*), this as well as the former Lease was void.

(*a*) There was no proof that a Fine was paid, and that charge was abandoned. (*b*) The same observation applies to this charge of a Fine paid.

The *Prayer* of the Bill was, that the two Leases might be declared to be void, and that the same might be delivered up to the Plaintiff to be cancelled, and that the Defendants might be decreed to deliver up possession of the Premises.

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The *Answer* of the Defendants, the Company of Proprietors of the *East London* Water-works, stated, they gave a valuable Consideration for the Assignment of the Leases to them, and that they were ignorant that the Lease in December 1780 was a Lease in Reversion, or that any Fine was paid in respect of the same; and denied that they had notice of the Will of the Testatrix; and stated that the Premises, though sold, were not conveyed to them; but that the completion of the purchase was in contemplation, a valuable Consideration having been given to them for that purpose.

The *Answer* of the Defendant *King*, stated that there was no mention of any Fine paid in the Lease of Dec. 1786, and his ignorance of any Fine paid, and that the Lease contained a Covenant on the part of *Ord* and *Planta* that the Lessees, their Successors and Assigns, should have peaceable enjoyment; and further stated, that the Lease of March 1798 contained no mention of any Fine, and his ignorance of any Fine paid, and that it contained a like Covenant as in the former Lease for peaceable enjoyment; and that in the Assignment of the Leases from the Governor and Company of the *Shadwell* Water-works to the *London Dock* Company, the former covenanted; that notwithstanding any act of theirs or their Predecessors, the Leases were good, and further covenanted for their Title to assign the Premises for the remainder of the two Terms. He

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admitted that *Ord* and *Planta* were described as Executors under the Will of the Testatrix in the Leases, and his belief that the *London Dock* Company had notice of the Will of the Testatrix; and stated that *G. Bowes* (deceased) attained twenty-one on the 17th November 1792, and after that time, and until his death, accepted Rent for the Premises under both the Leases, without questioning them. He then stated that a Bill had been filed by the *London Dock* Company against the Company of Proprietors of the *East London* Water-works, to perform their Agreement to purchase the Leases; and that there was a reference as to the Title, which was still pending; and the Answer further stated, that since the death of *G. Bowes*, in December 1806, no steps were taken to impeach the Lease, but that the Rent had been accepted and paid to Lady-day last.

Two questions arose, 1st, Whether the two Leases were warranted by the Power? 2dly, Whether, if the Leases were not good originally, they had been made so by subsequent acts?

Mr. *Horne*, and Mr. *Girdlestone*, for the Plaintiff:—

A Lease under a leasing Power must be according to the terms prescribed by such Power. The first Lease, granted 20th December 1786, was to take effect from *Christmas* in that year. It was therefore a Reversionary Lease, and was not warranted by the Power given by the Will of *Mary Bowes*, which only enabled the Trustees to make Leases in Possession, and not in Reversion. The second Lease, of the 1st March 1798, was also bad, because that Lease was granted after *G. Bowes* was of age, when, by the express terms of the Will, the power of leasing was to cease. The Leases were void, not voidable merely, and therefore incapable

of confirmation (*b*), and the receipt of Rent subsequently could not render them valid. In *Doe v. Butcher* (*c*), a Tenant for life had power to grant certain Leases; he granted Leases not warranted by the Power, and it was held, the subsequent acceptance of Rent by a Remainder-man did not confirm them. If the Leases had been capable of confirmation thereby, receiving Rent would not have confirmed them, unless received with an intention to confirm them, knowing them to be bad. The receipt of Rent subsequently to the Leases, accompanied by acts of accession to the Leases, might perhaps operate as a new grant (*d*); but here nothing took place but the mere acceptance of Rent, which could not alone be considered as amounting to a new contract. It will be urged that, as the Trustees had an absolute Interest, coupled with a Power, the Leases may take effect out of such Interest, though bad as an execution of the Power; but that cannot be here, because the Leases, on the face of them, appear to be granted in execution of the Power.

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Mr. Wetherell, and Mr. Spence, for the Company of Proprietors of the *East London Water-works*:—

These Leases were granted by the Executors and Trustees of the Testatrix; they are so named in the Leases; and though they might be bad as Leases under the Power, this Court will give effect to them, as made by Persons having vested in them the absolute Interest in the Property. A Lease for years by a Tenant for Life or in Tail is bad against a Remainder-man, because they have not dominion over the whole Estate, but here

(*b*) See Co. Litt. 295.

(*c*) Doug. 50.

(*d*) See *Goodright v. Strathan*,

Doug. 53, Edn. 3.

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the Trustees were absolutely possessed of these Leasehold Estates; and therefore, rather than that the Leases should be void, a Court of Equity would consider them good, and as derived out, not of the Power, but of their absolute Interest. Supposing that by the strict rule of Law these Leases are bad, yet, as they were granted by Trustees, the Court will support them as against their *Cestui que Trust*. The latter is bound by the acts of the former. An act, to amount to a breach of Trust, must be injurious to the *Cestui que Trust*. The Leases were not an injurious act, or a breach of Trust, in the serious sense of the expression. The Leases were good in every respect, except not being formal. The present Plaintiff came of age in 1806, and has ever since received the Rent. He must, during so long a period, have known how and when the Leases were granted. He cannot set up ignorance of the Leases. The second Lease was granted after *G. Bowes* was of age. He might, when of age, have called upon the Trustees to convey; but not doing so, he must be considered as approving of their acts. This Lease was not an injurious one. It had all the requisites of a good Lease except formality.

Mr. Blackburne, for the Trustees.

Solicitor General, Mr. Bell, and Mr. Phillimore, for the London Dock Company:—

The London Dock Company are Purchasers for a valuable Consideration. The Leases are good at Law, the Trustees having an absolute Interest in the Property, nor can they be avoided in Equity, unless as a breach of Trust. But a breach of Trust may be waived by the *Cestui que Trust*; and here the acts of the *Cestui*

que Trust must be considered as having waived it. For thirty years past the Rent has been received on these Leases; the present Plaintiff has received it for nine years. There was no improvidence in the Leases. The charge that Fines were taken is abandoned.

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Mr. Horns was stopped in his reply by

The VICE-CHANCELLOR:—

These Leases cannot be supported. At Law, where the Person who has the limited Power has also the whole legal Interest, a Lease not according to the Power will be supported by the estate of the Lessor. But if the absolute legal Interest be on a Trust for the benefit of another, and a limited power of leasing be given to the Trustee, then a Lease not according to the Power, though good at Law in respect of the legal estate of the Trustee, will be bad in Equity as a breach of Trust. These Leases are therefore plain breaches of Trust; one of them being a reversionary Lease, and the other being made after G. Bowes had attained his age of twenty-one and when the power to lease had determined.

It has been argued that a *Cestui que Trust* cannot complain here that the Trustee has exceeded his authority, unless he proves that he has in consequence sustained some positive injury: my opinion is, that where Trustees depart from the rule of conduct prescribed to them, neither they nor those who claim under them with notice, can in any case sustain an interest so derived, as against their *Cestui que Trusts*; and that the *Cestui que Trusts* are not called upon to prove actual injury.

It is said, that the Plaintiff having received the Rent

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and others.

for nine years, has precluded himself from equitable relief in respect of the Leases, if he were otherwise entitled to it. If the Plaintiff, when he succeeded to the Property, had, with full knowledge of the imperfection of the Leases, and in consideration of the Defendants agreeing to continue Tenants, consented to leave them undisturbed, that would have amounted, not to a confirmation of the Lease, because he could not confirm for those who stood behind him, but to an Agreement, by which I should have held him bound for his life, if the Leases continued so long. But it is plain that this Plaintiff, during the receipt of the Rent, was wholly unaware of the imperfection of the Leases. The Plaintiff however ought to have looked into his rights; and as, by his negligence to obtain information with respect to them and to assert them, the Lessees may have been led to expenditure on the Premises, the benefit of which they will now lose, I shall not direct an Account beyond the filing of the Bill, nor shall I give the Plaintiff Costs.

PICKARD v. ROBERTS.

5th November.

*Wife cannot,
by consent in
Court, dispose, in
favour of her
Husband, of her
Reversionary
Interest in
personality.*

THIS was the Petition of the Plaintiff *Mary Pickard*, and *Ralph Milner*, and *Maria* his Wife, late *Maria R. Ward*.

One *Richard Ward*, by his Will, gave certain personal Estates to Trustees, upon Trust, to lay the same out in

the Funds, and to pay the annual produce thereof to his Wife the Petitioner *Mary Pickard* for her Life; and after her decease, in Trust for all his Children by her who should attain twenty-one, equally to be divided between them. The Testator at his death left three Children, one of whom was the Petitioner *Maria Milner*. *Mary Pickard* made a Gift of her Life Interest to *Ralph Milner* her Son-in-Law (a), and the object of the Petition was, that the Reversionary Interest to which *Maria Milner*, who had attained twenty-one, would be entitled on the death of her Mother, might be paid to her Husband *R. Milner*; the other Petitioners, *Mary Pickard* and *Maria Milner*, consenting thereto.

Mr. *Bell*, in support of the Petition, mentioned *Richards v. Chambers* (b).

Mr. *Agar*, and Mr. *Rouppell*, *contra*.

The VICE-CHANCELLOR:—

My opinion is, that a Wife by her consent in a Court of Equity, can only depart with that Interest which is the creature of a Court of Equity,—the right which she has in a Court of Equity to claim a provision, by way of Settlement on herself and Children, out of that Property which the Husband at law would take in possession in her right. Her Equity arises upon his legal right to present possession. This principle has no application to a Remainder or Reversion: when the Remainder or Reversion falls into possession, then the Equity arises. If the Wife by her consent could pass a Remainder or Reversion in personal Property to the Husband, she would not only part with a future possible

(a) This fact was admitted, (b) 10 Ves. 580.
but not stated in the Petition.

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Equity, but with her chance of possessing the whole Property by surviving her Husband; and to give this effect to her consent, would make it analogous to a fine at law, with respect to real Estate, a principle always disclaimed in a Court of Equity. A Court of Equity interferes to protect the Property of the Wife against the legal rights of the Husband, and will never lend itself as an instrument to enable the Husband to acquire a right in the Wife's personal Property, which he can by no means acquire at law.

10th Nov.

EDRIDGE v. EDRIDGE and Others.

If the Bank of England are unnecessarily made Parties to a Suit, the relief against them being obtainable under the Stat. 39 and 40 Geo. III, the Bill will be dismissed against them with Costs, to be personally paid by the Plaintiffs.

IN this Case the *Bank of England* were made Parties Defendants, and on their Costs being asked for, the Vice-Chancellor observed, they were necessary Parties, as a Discovery was sought from them which could not otherwise be had; but that whenever they were unnecessarily made Parties, as in the Cases provided for by the 39 and 40 Geo. III, c. 36, he should dismiss the Bill as to them with Costs, to be personally paid by the Plaintiffs, the Statute being otherwise rendered useless (a).

(a) In *Strymaken v. Northcote*, 13th June 1817, the Vice-Chancellor expressed his regret that the *Bank of England* were so often unnecessarily made Parties. In *Temple v. Bank of England*, 6. Ves. 770, the Lord Chancellor determined that a *Demurrer* by the *Bank of England* would not hold, though

in a case where the relief prayed against them might have been obtained by an application under the Act; the Act not restraining a Plaintiff from making the *Bank* Parties. See also *Attorney General v. Gale*, mentioned in the Note to that Case, and also *Mundrell v. Mundrell*, there mentioned.

1818.

STUART and vs. Lord Viscount KIRKWALL,
 ANNA MARIA his Wife, WILLIAM J. FAUZIA
 SAVORY, and ROBERT TALBOT.

THIS was a Suit by a Milliner and her Husband against the Defendants, the Bill stating an acceptance of a Bill of Exchange, drawn for 889*l.* 14*s.* 6*d.* payable at eighteen months, with Interest, by the Defendant Viscountess Kirkwall, which Bill was dishonoured; and further stating, that in 1814, and ever since, the Viscountess lived separate from her Husband; and that a separate maintenance or annual Sum of 1,600*l.* was, by a Deed executed by the Viscount and his Wife, on the one part, and Savory and Talbot, Trustees, of the other part, secured to her, which was duly paid quarterly; and praying, that an account might be decreed to be taken of what is due and owing from said Defendants William James Fauzia Savory and Robert Talbot, in respect of said Annuity of 1,600*l.*; and that the said last named Defendants might be decreed to pay and satisfy the said demand of Plaintiffs from and out of what shall appear due from them on taking the said last mentioned Account, so far as the same will extend, and to pay and satisfy the residue of the said debt or demand of Plaintiffs out of the future growing payments of the said Annuity from time to time, as the same shall become due and payable, until the debt of Plaintiffs shall be duly paid and satisfied; and, if necessary, that it may be referred to one of the Masters of the Court of Chancery, to ascertain the amount of the said debt due to Plaintiffs;

10th Nov.
A Married Woman separated from her Husband, and having a separate Maintenance, renders the same liable, by accepting a Bill of Exchange.

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that the said Defendants *William James Fauzia Savory* and *Robert Talbot* might be restrained by the Injunction of this honourable Court from paying to the said Defendant Viscountess *Kirkwall*, or to any Person or Persons for her use, any sum or sums of Money received by them or either of them, on account of the said Annuity of 1,600*l.*, or any of the future growing payments of the said Annuity; and that the said Defendants Viscount and Viscountess *Kirkwall* might be in like manner restrained from instituting any proceeding to compel the payment of the same or any part thereof.

The facts of the Case were admitted by the Answers, and the only question made was, whether Viscountess *Kirkwall* could affect her separate Estate by accepting a Bill of Exchange.

Mr. *Bell*, and Mr. *Abercromby*, for the Plaintiffs, cited *Hulme v. Tenant* (*a*), *Bullpin v. Clarke* (*b*), and what the Lord Chancellor says in *Parker v. Wey* (*c*); and said this Case was distinguishable from *Greatly v. Noble* (*d*), where no Security had been given.

Mr. *Horne*, *contra*, for Viscount and Viscountess *Kirkwall*.

Mr. *Sidebottom*, and Mr. *Blackburne*, for the Trustees.

The VICE-CHANCELLOR:—

I had occasion to consider this doctrine fully in the case of *Greatley v. Noble*. I then was, and now am of

(*a*) 1 Bro. C. C. 16.

(*b*) 17 Ves. 305.

(*c*) 11 Ves. 220, &c.

(*d*) *Ante*, p. 79.

opinion, that a Feme Covert being incapable of contract, this Court cannot subject her separate Property to general demands. But that, as incident to the power of enjoyment of separate Property, she has a power to appoint it, and that this Court will consider a Security executed by her, as an appointment *pro tanto* of her separate Estate. Let the Decree be according to the *Prayer* of the Bill.

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[*Note*.—On the coming in of the Answers, the Plaintiffs, on the 26th November 1818, applied to the *Lord Chancellor* for an Injunction to restrain Lord *Kirkwall* and the two Trustees from paying to Lady *Kirkwall*, or to any Persons except the Plaintiffs, the Money then due or thereafter to become due in respect of the said annual Sum of 1,600*l.*, until the debt due to Plaintiffs, and all Interest, Charges, Costs and Expences incident thereto, should be paid; and that Lady *Kirkwall* might be restrained from receiving the same; and that Lord *Kirkwall* and the Trustees, or some or one of them, might be directed to pay the same, as it became due, into the Bank, in the name and with the privity of the *Accountant General*, in Trust, in this Cause. Upon the coming on of this Motion, and after hearing Mr. *Leach* and Mr. *Heald* for the Plaintiffs, Sir *Samuel Romilly* and Mr. *Horne* for Defendant, Lord *Kirkwall*, and Mr. *Hart* for the Trustees, the *Lord Chancellor* made the Order.]

1818.

COLLINS v. CRUMPE.

15th Nov.

THIS was a Bill filed for a Legacy of 300*l.*; and by a Decree on the 12th May 1817, the Defendant was directed to pay to the Plaintiff the Sum of 300*l.* together with Interest thereon, after the rate of four per cent., from the 7th May 1813; and it was referred to the Master to calculate the Interest; and the Defendant was directed to pay the Costs of the Suit, to be taxed by the Master.

A Writ of Execution of an Order for Payment of Money was issued, and afterwards an Attachment,

upon which the Defendant was taken, and he paid the Money.

A Motion was then made for a reference to

the Master, to tax the subsequent Costs, and that the Defendant might be ordered to pay such Costs, but the Motion re-

The Master, by his Report, 24th December 1817, certified that there was due to the Plaintiff, for Principal, Interest on the Legacy, 352*l.* and for Costs 115*l.*; which Report was absolutely confirmed, by Order, 19th Feb. 1818.

A demand was made for the Principal, Interest and Costs, but the same not being paid, an Attachment issued for the Costs, and the same were afterwards paid.

The Decree not having fixed a definitive time for the payment of the Principal and Interest, a short Order was obtained, directing the payment within a month; but not being paid, a Writ of Execution of the Order was served on the Defendant, and afterwards an Attachment issued, and the Defendant paid the Money.

Mr. Roupell now moved, that it might be referred to the Master to whom the account and matters in this Cause stood referred, to tax the Plaintiff the subsequent

Costs of the Suit, and that the Defendant might be ordered to pay such subsequent Costs when taxed.

1818.

COLLINS

v.

CRUMPE.

The VICE-CHANCELLOR:—

There is no mention of Costs in the Writ of Execution of the Order, and if on issuing the Writ the Money is paid, the Costs are borne by the Party issuing the Writ (*a*), but when the Defendant was taken on the Attachment for not obeying the Writ of Execution, you might have insisted on having the Costs before he was liberated. By accepting the Principal and Interest only, and discharging him, you have lost your claim to Costs (*b*).

(*a*) See Turn. and Ven. Pract. p. 53 in Note; Edn. 4.

(*b*) It seems that when the Defendant was in custody upon the Attachment, a. Motion should have been made to refer it to a *Master* to compute the Interest on the principal Sum due from the date

of his Report and the Costs of the Proceedings to enforce the Order, and that the Defendant should not be liberated until the Principal and Interest, together with the subsequent Interest and Costs, were paid. See Higgins v. —, 8 Ves. 381.

1818.

GENERAL ORDER.

LORD CHANCELLOR.

August 21.

WHEREAS it hath been hitherto the Practice on the Petition of the Bankrupt, with the Consent of the Creditors who have proved Debts under the Commission, to issue a Supersedeas on a Petition presented after the first, and before the second Meeting, and in some Cases, when the petitioning Creditor alone may have proved his Debt, and signed such Consent, without the concurrence in or knowledge of such proceeding by the greater number of the Creditors:—I do therefore Order, That in future, no Commission shall be superseded on the ground of such Consent of all the Creditors who shall have proved their Debts, having been given, until after the second Meeting: And I do further Order, That on the Commissioners being satisfied at the second Meeting that a Petition will be presented for superseding the Commission, with the consent of all the Creditors who shall have proved Debts, that the Commissioners do, in such case, adjourn the choice of Assignees to some future day, in order to give the opportunity of presenting such Petition for a Supersedeas in the manner hitherto accustomed.

END OF PART II.

C A S E S

BEFORE THE

VICE-CHANCELLOR.

COX v. ALLINGHAM.

13th Nov.

WHEN a Cause stands over, with liberty to amend, paying the Costs of the day, and the Plaintiff does not amend within a reasonable time, a Motion may be made that the Plaintiff shall amend within a limited time, and the Vice-Chancellor said the Plaintiff ought to pay the Costs of such Motion, it being by the Plaintiff's default that the Motion became necessary. In this Case, however, Costs were not given, as the Notice of Motion was silent as to Costs.

When a Cause stands over, with leave to amend the Bill, and a Motion becomes necessary that the Plaintiff should amend within a limited time, the Plaintiff pays the Costs of such Motion.

1818.

FOSTER v. DEACON.

13th Nov.

*The completion
of a Contract
being delayed for
three years by
difficulties in
the Title, the
Vendor held ac-
countable for a
deterioration of
the Land during
that period.*

BY an Agreement, 16th of October 1815, the Defendant agreed to sell to the Plaintiff certain Lands, and that the Purchaser should take the Rents and Profits from Michaelmas then last, and that Interest at five per cent. on the Purchase Money should be paid from that time until the Purchase should be completed. The Lands were then and still were in the possession of the Defendant. A Decree was obtained for a specific performance of the Agreement, and the usual reference made as to Title.

A Motion was now made on behalf of the Purchaser, that it might be referred to the *Master*, to whom the Cause stood referred, to inquire and state to the Court what abatement ought to be made out of the Purchase Money, for or in respect of the deterioration in value of the Premises since the Purchase, and that the *Master* might be at liberty to state in his Report any special circumstances that he might think proper.

In support of the Motion, affidavits were filed to show the deterioration of the Premises. Other affidavits were made in answer.

There were two other Motions by different Purchasers, to the same effect.

Mr. Barber, in support of the Motion.

Mr. Heald, for the Trustees.

Mr. Wetherell, and Mr. Roupell, for the Vendor.

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The VICE-CHANCELLOR:—

If a Purchaser is kept out of Possession for Three years, by difficulties in the Title, and the Land during that time remains uncultivated and otherwise deteriorated, it is obvious the Purchaser cannot have what he agreed to purchase, but Land diminished in value. If there had been wilful waste by the Vendor, I should have had no hesitation in making him answer for the same out of the Purchase Money, but there is no wilful waste in this Case; it is waste occasioned by negligence; and being so, when this Motion came on before, I thought it necessary it should stand over, to ascertain, to whom the delay in completing the Purchase was attributable. The Affidavits do not make out that the Purchaser could at any time with propriety have accepted the Possession. An offer of interim Possession was, indeed, made by the Vendor, but the Vendee was not bound to accept it, nor could he prudently accept it, whilst the Title was questionable.

Part of the deterioration seems attributable to the conduct of a Tenant whose lease has expired, but the Vendor is answerable for his Tenant.

I do not sift the Affidavits as to the deterioration of the Land. It is enough to say, they are sufficiently strong to justify a reference to the Master. Let it be referred to the Master, to inquire whether the Lands or Hedges and Fences of the Estate have suffered any, and what, deterioration, and to what amount, by unhusband-like conduct and mismanagement of the Lands, since

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propriety some time hence, if my life should be spared, than at present, on account of my property being outstanding, not capable of being so accurately estimated as I could wish; and in all other respects I confirm my said Will."

The Testator died on the 11th August 1816, leaving assets sufficient to answer the Plaintiff's claim; and the Defendants, *Davidson, Duffell* and *Shaw*, proved his Will.

Nathaniel Bogle French, the Plaintiff's late Father, died on the 9th December 1817, without having obtained his Certificate under his Bankruptcy, leaving the Plaintiff, his only unmarried Daughter, in distressed circumstances and without any property, and Three unmarried Sons, one of them an infant.

At the death of the Testator, *N. B. French* had another daughter who was unmarried, but who afterwards married the Defendant *William Law*, a short time before the death of her Father, *Nathaniel Bogle French*.

The Testator in his life-time, and *Elizabeth French*, paid the sum of 300*l.* to the Plaintiff's Father, on the 6th July 1817, being the first quarterly payment of the Annuity. The *Prayer* of the Bill, was, that the Trusts of the Fourth Codicil as to the Annuity of 600*l.* might be established, and that the Plaintiff, as the only unmarried Daughter of the said *Nathaniel Bogle French* deceased, might be declared entitled to the whole of the Annuity of 600*l.* for her own use and benefit, during so long as she should remain unmarried; and that, if necessary, the Defendant *Elizabeth French* might be decreed to appoint the whole of such Annuity to the

Plaintiff; and that an account might be taken of what was due to the Plaintiff; and that the Defendants the Executors might be decreed to pay the same to the Plaintiff, out of the Testator's personal Estate and Effects not specifically bequeathed ; and that a sufficient part of the Testator's Estate and Effects might be set apart for the purpose of securing the due and punctual payment of the said Annuity of 600*l.* to the Plaintiff, or for her benefit.

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and others.

The Defendants, *Davidson, Deffell and Shaw*, by their Answers, admitted assets, according to their present state, sufficient to pay the Annuity. They further stated, that the Defendants *Augustine Bogle French* and *James Bogle French*, are now placed in situations wholly different from that which the Testator contemplated at the time of making his Fourth Codicil, and that in consequence, *Elizabeth French*, before and since the death of the Testator, gave notice of her intention to discontinue, and she has in fact discontinued the payment of the Annuity of 600*l.*; and they, by their Answer, insisted that the bequest of the Annuity by the Testator, was either altogether void from the uncertainty of the expressions used by the Testator, or that in consequence of the discontinuance of payment by *Elizabeth French*, and of the events which have occurred, and particularly of the death of *Nathaniel Bogle French*, and the alterations in his family, the Annuity is no longer payable ; and that the payment of the same has become both unnecessary and inexpedient, and that the same ought not now to be paid by the Defendants, or at least, that a proportion only of the sum is now payable ; and that in all events, the same or any part thereof is only payable as long as the produce of the Estates of *William Jackson, Esq.* continues to be consigned to the

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house of *John Deffell and Son*, which consignments the said *Elizabeth French* is at liberty to direct to any other house whenever she pleases.

Elizabeth Bogle French, by her *Answer*, insisted that the payment of her proportion of the Annuity of 600*l.* was on her part merely voluntary, and that her proportion was determinable at any time, at her pleasure; and that in consequence of the conduct of some part of the late *Nathaniel Bogle French's* family, and of alterations in the same, she, during the life of *Nathaniel Bogle French*, gave notice of her intention to discontinue the Annuity; and had since actually discontinued her proportion of the joint Annuity or Allowance; that since the Bankruptcy of *Nathaniel Bogle French*, the consignments of the Estate of the Defendant's late Father have been made to *J. Deffell and Co.*, but that she has a right to cause the consignments of the Estate to be made to any other mercantile house.

James Bogle French, (one of the Sons of *Nathaniel Bogle French* deceased) by his *Answer*, claimed to be entitled to one fourth part or share of the Annuity of 600*l.* bequeathed by the Testator *Richard Shaw*.

Augustine Bogle French (another Son of *Nathaniel Bogle French* deceased,) by his *Answer*, claimed another fourth part of the Annuity bequeathed by the Testator.

The Infant, *Augustine Bogle French*, (another Son of *Nathaniel Bogle French* deceased,) submitted his interest to the protection of the Court.

William Law, and *Letitia Bogle Law*, his Wife, by their *Answer*, claimed to be entitled in her right to one

fifth part of the Annuity given by the Testator *Richard Shaw.*

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v.
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and others.

Sir A. Pigott, and Mr. Raithby, for the Plaintiff:—

The first part of the Codicil is mere recital, and then follows the legatory disposition. The Annuity is given so long as the consignments of the Estates were made to *Deffell and Co.*; *French* the Father, and his unmarried Children, took a joint interest; after his death it survived to his Daughters. So long as *French* the Father lived, he was permitted to receive the whole Annuity; after his death, one of his daughters, the Defendant Mrs. *Law*, married; she is therefore no longer an unmarried Child, or entitled to claim any thing except what she might be entitled to upon the death of her Father, and her marriage. The Plaintiff has continued unmarried, and is, as we contend, the only person entitled to claim the Annuity, as her Brothers could never have been meant to take. Two of them had attained twenty-one, and must be supposed capable of providing for themselves; but supposing they are included in the words of the gift, Mrs. *French* may appoint the Plaintiff to take the whole, and the Court will probably direct her to do so, the two Sons being provided for. Mrs. *French* was not bound to continue her bounty, but it cannot be said that the continuance of her bounty was the condition on which *Shaw's* Legacy was to depend. If her's was withdrawn, there was more occasion for *Shaw's*. It was not left to the absolute discretion of the Executors whether they should continue the Annuity; their discretion was limited, not arbitrary. They were to continue it, unless it was "unnecessary, inexpedient and impracticable;" it is "necessary and expedient," because the Plaintiff has no other means of support; it is not "impracticable," because the Executors admit

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assets. The Executors assign no reason for withdrawing this Annuity. The Court will not say they have an absolute discretionary authority, unless compelled by the words of the Will, as such an authority would be subject to great abuse.

Mr. Bell, for the Executors, and the Counsel for the other Parties, were stopped by

The VICE-CHANCELLOR:—

This Codicil is an authority to his Executors to pay to Mrs. *Bogle French*, for the purposes stated, 600*l.* a year out of his Residuary Property, so long as the produce of Mr. *Jackson's* Estate should be consigned to the house of *John Deffell & Son*. The recital explains, that he was partly induced to give this authority by Mrs. *French's* promise to contribute the same sum, but he has not made the authority dependant upon her performance of that promise. The Executors are to exercise the authority, unless circumstances shall render it "unnecessary, inexpedient and impracticable;" by which must be meant, "shall in their opinion render it unnecessary, inexpedient and impracticable." If they had distinctly stated in their Answer, that they had not made the payment, because, using their best discretion upon the subject, they had come to a conclusion that circumstances had rendered the payment unnecessary, inexpedient and impracticable, a Court of Equity could not have controlled their judgment, unless it appeared that they had acted *mala fide*. But their answer states many mixed motives for their refusal to pay this annuity; and it is plain, that they have never simply addressed themselves to the sound exercise of that discretion which the Testator has been pleased to place in them.

It is a reasonable conjecture, that the Testator meant, that only *French* and his unmarried Daughters should take this Annuity; but he has used the general expression, of "unmarried Children."

If, however, this Annuity be continued, Mrs. *Bogle French* may appoint the whole of the Annuity to be paid to the Plaintiff, but I have no authority to direct her to do so.

Declare, in the words of the Will, that the Annuity is to be paid so long as the Consignments are continued, unless, in the judgment of the Executors, circumstances shall render it unnecessary, inexpedient and impracticable.—

The Costs must be paid out of the Testator's Estate.

TIDWELL v. ARIEL and others.

Nov. 19th.

THE Bill stated, that the Plaintiff, *Samuel Tidwell*, was the only child and heir of *Dorothy Tidwell*, one of the Daughters and Legatee of *David Kirkby*:—That the Testator, *David Kirkby*, by his Will, 14th October 1812, among other things, gave and bequeathed to *George Jackson* and *George Mackareth*, two of the Defendants, all his Bills, Bonds, Book-debts, Goods, Chattels, or whatsoever to him belonging or appertaining at his decease (except as therein is excepted), in trust nevertheless, in confidence reposed in them, to and for

A Legacy to A. of 600 l. to be paid at the end of one year after the Testator's death, or to her respective Heir, held to be lapsed by the death of A. in the life-time of the Testator.

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such Uses, Intents, Ends and Purposes, as he had thereafter mentioned ; and he thereby willed, ordered and directed his said Trustees, *George Jackson* and *George Mackareth*, and the survivor of them, and their heirs, to pay and apply the same in payment of such legacies as he had thereafter in his said Will given and bequeathed ; and after giving to his Wife a sum of 200*l.* to will and dispose of as she should think meet at his decease, and directing his said Trustees, *George Jackson* and *George Mackareth*, and the survivor of them, and their heirs, to place out at interest and invest in good security the sum of 500*l.*, and to pay the Interest thereof to his Son *Miles Kirkby* during his life, the Testator gave and bequeathed to his Son *David Kirkby*, the sum of 300*l.*, and he also gave and bequeathed to his Daughter *Elizabeth*, the Wife of *William Ariel*, the sum of 600*l.*, and also to his Daughter *Jane*, the Wife of *Richard Derry*, the sum of 600*l.*, and also to his Daughter *Mary Fenton*, Widow, the sum of 600*l.*, and also to his Daughter *Ann*, the sum of 300*l.*, and he also gave and bequeathed to his said Daughter *Dorothy*, then the Wife of Plaintiff, *T. L. Tidwell*, the sum of 600*l.* and also to his Grandson *David Kirkby*, Son of his late Son *William Kirkby* deceased, the sum of 100*l.*, and also he gave and bequeathed to Defendant, *George Mackareth*, the sum of 20*l.*; all which said several and respective Legacies the said Testator willed, *that they should be paid by his said Trustees, at the end of one whole year next after his decease, or to their several and respective Heirs*; and after payment of all his just Debts, Funeral and Testamentary Expenses, the sum of 500*l.* being placed out at Interest, the Legacies by him therein-before given and bequeathed, and they his said Trustees, *George Jackson* and *George Mackareth*, and the

Survivor of them, and their Heirs, retaining in their hands for all their trouble, loss of time and expences attending the said Trust, being first deducted and abated out of his Effects; the just Balance that might then appear in his Trustees hands, he gave and bequeathed such Balance unto his said Sons and Daughters, share and share alike, and to be paid unto them severally and respectively by the said Trustees, *George Jackson* and *George Mackareth*, and the Survivor of them, or their Heirs, at the end of one whole year next after his decease, or their several and respective Heirs; and he further willed, that after the death of his said Son *Miles Kirkby*, the principal sum of 500*l.* so out at Interest, should be called in by his said Trustees, and the survivor of them, and their Heirs, and should be paid or divided to and among the Children of his said Son *Miles Kirkby*, or to their several and respective Heirs, at the end of one whole year next after his said Son *Miles Kirkby's* decease; and the said Testator appointed the said Defendants, *George Jackson* and *George Mackareth*, joint Executors in Trust of his said Will, desiring they would perform the same as near to his intent as they could.

The Bill stated, that the Testator died in 1814, leaving *David Kirkby* the younger, *Miles Kirkby* and *Ann Kirkby*, *Elizabeth* the Wife of *William Ariel*, *Jane* the Wife of *Richard Derry*, and *Mary Fenton*, his only Children him surviving; *David Kirkby*, the Son and Heir of his deceased Son *William Kirkby*, and Plaintiff *Samuel Tidwell*, the Son and Heir of his said Daughter *Dorothy*, who died very shortly before him:—That *George Jackson* and *George Mackareth* proved the Will, and possessed assets sufficient to pay the Legacies, and they paid several Legacies,

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except the Legacy of 600*l.* bequeathed to the said *Dorothy Tidwell*, who having, as before mentioned, died a few weeks before the death of the Testator, it was alleged, that her Legacy, and all the benefits expressed to be given to her by the Will, became thereby lapsed; but Plaintiff, by his Bill, submitted, that by the true construction of the Testator's Will, none of the Legacies or Benefits therein given or mentioned to be given to his Children, could be held to have lapsed by their death, inasmuch as the Testator had in his said Will expressly directed his Trustees to pay such Legacies and Benefits to his Children, or their several and respective Heirs; and further insisted, that upon the Testator's decease, although the said *Dorothy Tidwell*, his Mother, was not then living, yet that under the circumstances aforesaid, of the Testator's express declaration of his intent in that behalf to the said *George Mackareth*, and also by the true construction of his Will, the Legacy of 600*l.*, and also of the share of the Residue therein mentioned to be given to her, took effect nevertheless, and vested in him under the description of her Heir; or in case the Court should be of opinion that the Testator meant by the word "Heir," with reference to the nature of the property bequeathed, rather to describe or denote the personal representatives of his said Legatees, in that case the Plaintiff *John Lawrence Tidwell* submitted, and insisted, that the Legacy and share of Residue, mentioned to be given to the said *Dorothy*, his late Wife, vested in him as her Administrator and personal Representative. The *Prayer* of the Bill was accordingly.

The Executors, by their Answer, admitted assets, and submitted to act as the Court should direct.

Ann Kirkby, Richard Derry and Jane his Wife, and Benjamin Rayson and Mary his Wife, late Mary Fenton, and David Kirkby, by their Answers, insisted that neither of the Plaintiffs had any claim to the Legacy.

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When the Cause was opened, the Vice-Chancellor said, that *John Lawrence Tidwell*, the Father, was improperly joined with his Son as Plaintiff, they having conflicting Interests, and that the Cause must stand over, with liberty to amend the Bill by making the Father a Defendant. But upon a letter of the Father being produced, by which he agreed to give up, in favour of his Son, any Interest he might be entitled to under the Will, the Cause was permitted to proceed.

Mr. Wetherell, and Mr. G. Wilson, for the Plaintiffs:—

The question is, whether on the death of *Dorothy Tidwell* the Legacy lapsed, or whether her Son or her Husband is not entitled to it, as being a substituted Legatee in case of her death. The Testator was providing for all his family, and could never mean that if a Child died in his life-time his Grandchild should be left destitute. It is clear that a lapse of the Legacy may be prevented if the Testator uses expressions with that design. The Testator here, contemplating the possible death of his Children in his life-time, provides that the Legacies shall be paid to the Legatees at the end of one year after his decease, “*or to their several and respective Heirs.*” There is no authority expressly in point. Several Cases, *Elliot v. Davenport* (*a*), *Maybank v. Brookes* (*b*), have

(*a*) 1 P. Wms. 83, S. C.

(*b*) 1 Bro. C. C. 84.

2 Vern. 520.

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undoubtedly established, that a Legacy to a man, his Executors, Administrators and Assigns, lapses by the death of the Legatee in the life-time of the Testator; but where an intention is shown that the Legacy shall not lapse by the death of the Legatee, then, where the Legacy has been given to *A.* his Executors or Administrators, the Executors have taken on the death of the Legatee, as in *Sibley v. Cook* (*c*). In that Case, the Testator expressly provided for a lapse by death. The intention is not, it must be admitted, so clearly demonstrable on this Will as in *Sibley v. Cook*. The words here are not, to the Legatee, his Executors or Administrators, but to the Legatee *or* her Heirs: *or* is disjunctive, and cannot be construed *and*. In *Stone v. Evans* (*d*), the Testator gave the Residue of his Estate to his Executrix, *or* to her Heirs, Executors, Administrators or Assigns; and the Court seems to have thought the word *or*, would have amounted to a substitution of the Legatee, but held, that as the Legacy was given to her as Executrix, and she dying in the Testator's life-time, the Legacy lapsed. In *Corbyn v. French* (*e*), the Legacy was given to *E. C.*, *or* her proper representative. It was held, under the circumstances of that Case, to lapse; but the *Master of the Rolls* says, "I will not determine now, because it is not necessary, that where a Legacy is given to a Person *or* to his Representatives, it can mean any thing but in case of his death in the life of the Testator; but it is perfectly clear, that where the Fund is given to one for life, and after the death of that person to several others, and in case of their death, to their representatives, there is no reason to presume an

c) 3 Atk. 572.

(d) 2 Atk. 86.

(e) 4 Ves. 418.

intention that it shall not lapse by the death of the Legatee in the life of the Testator." The meaning of the word *or* is clear; it is used not only as to the Legacy of 600*l.*, but in the gift of the Residue. The Court will not make a man die intestate as to any part of his property, unless unavoidably bound to do so. Then what is the meaning of the word *Heirs*? Either the Son takes as Heir, or his Father as legal Representative; but as the Father has given up his interest in favour of his Son, which shall take is not material.

Mr. *Heald* and Mr. *Pepys*, *contra*, were stopped by

The VICE-CHANCELLOR:—

The Legacy of 600*l.* is in the first place given to *Dorothy*, *simpliciter*, as a mere personal Legacy, failing by her death before the Testator. The Testator afterwards directs, that his respective Legacies shall be paid by his Trustees at the end of one whole year next after his decease, or to their several or respective Heirs. It is said that this direction is inconsistent with a mere personal Gift to *Dorothy*, and is therefore a substitution of a new Legatee in the event of her dying before the Testator. If the direction had been, that the respective Legacies should at his death be paid to the Legatees or their respective Heirs, the inconsistency contended for would have existed: but a payment to the Representative at the end of a year after the Testator's death, if the Legatee be not then living, is not inconsistent with a personal Gift to the Legatee. The same reasoning applies to the Gift of the Residue. The Bill must be dismissed, but without Costs. I wish I could give the Plaintiff his Costs: but the Court cannot do this when it dismisses the Bill.

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17th Nov.

Bequest to A. for Life, and afterwards to B. but if he should be then dead, to C. and D. in equal shares, or the whole to the survivor of them. B. died in the life of the Tenant for Life, as did also C. and D. Held that the Gift to C. and D. was a vested interest in them as Tenants in Common, subject to be divested if one only should survive the Tenant for Life.

THE Bill stated, that *C. Whitley*, being entitled to 1,000*l.* charged upon certain Lands, whereof her Brother *Ralph Whitley* was seised in fee, subject to that charge, and entitled also to personal Estate, she, by her Will, 13th August 1767, amongst other Bequests, bequeathed as follows :

“ Whereas I am entitled to the sum of 1,000*l.* by virtue of a Deed of Settlement, chargeable upon my late Brother *Whitley*: Now I do hereby give and bequeath the said sum of 1,000*l.* to my friends *Lloyd Kenyon*, of *Gredington*, Esquire, and Mr. *Whishaw*, in *Chester*, upon this special trust and confidence, that they the said *Lloyd Kenyon* and *Hugh Whishaw*, and the Survivor of them, and the Executors or Administrators of such Survivor, shall place the same out at Interest, or continue the same at Interest on the present security, and pay the Interest and Produce thereof from time to time as the same shall be paid, unto my Cousin *Abigail Jones*, during the term of her natural life; and after her death, upon further Trust, that the said *Lloyd Kenyon* and *Hugh*

Whishaw, and the Survivor of them, and the Executors or Administrators of such Survivor, pay the Interest of the said principal sum of 1,000*l.* to Miss *Elizabeth Chetwode*, and Mrs. *Davison*, of the *Brand*, Daughters of the late Sir *Philip Tronchett Chetwode*, of *Oakley*, Bart. in equal shares during their joint lives; and after the death of either of them, then in Trust that they pay the whole Interest of the said 1,000*l.* to the Survivor of them the said *Elizabeth Chetwode* and Mrs. *Davison*, for her life; and I do hereby will and direct that the said Legacy or Bequest of such Interest to the said Mrs. *Davison*, is for her own sole and separate use, and not to be liable to the Debts, intermeddling, or control of her Husband, but her Receipt or Receipts alone shall from time to time be a sufficient discharge to my said Trustees on account thereof: and from and after the death of the Survivor of them the said *Elizabeth Chetwode* and Mrs. *Davison*, upon further Trust, and I do direct my said Trustees, and the Survivor of them, and the Executors and Administrators of such Survivor, to pay the principal sum of 1,000*l.* to my Cousin, Sir *John Chetwode*, Bart.; but if he be then dead, then and in such case I will and direct that the said Trustees shall pay the said sum of 1,000*l.* to his two Brothers in equal shares, or the whole to the Survivor of them. And the said Testatrix thereby gave and bequeathed unto her said Cousin, *Abigail Jones*, all the rest, residue and remainder of her personal Estate, of what nature or kind soever:—That the Testatrix appointed the said *Abigail Jones* Executrix of her said Will.

That the Testatrix died soon after the making of her

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Will ; and that *Lloyd Kenyon, Hugh Whishaw, Eliz. Chetwode, Abigail Jones, Mrs. Davison, Sir John Chetwode*, and his two Brothers, *Charles Chetwode* and *Philip Chetwode*, survived the Testatrix :—That *Abigail Jones* proved the Will, and possessed Assets sufficient to pay the Testatrix's Debts, Funeral Expenses and Legacies ; but the 1,000*l.* was not paid, but still remained a charge upon the Lands :—That *Eliz. Chetwode* died many years ago, and after her death *Charles Chetwode* died intestate, leaving a Widow and one Child, now the Wife of the Defendant *Wm. Rose*, and that the Widow of *Charles Chetwode* obtained Letters of Administration to him, and afterwards married *Wm. Bertles* (since deceased) :—That after the death of *Charles Chetwode, Philip Chetwode* died, and by his Will appointed his Wife *Ann Chetwode* universal Legatee and sole Executrix, and she proved his Will, and afterwards died, and by her Will appointed the Plaintiff her residuary Legatee and Executor, and he proved her Will :—That after the death of *Philip Chetwode*, the said Sir *John Chetwode* died :—That Mrs. *Davison*, after the date of *Charlotte Whitley's* Will, married *Edward Mainwaring*, and the 1,000*l.* was paid to Mrs. *Mainwaring* during her life, and on the 13th *February 1816* she died :—That *Abigail Jones* died on the 1st *June 1776*, and that *Mary Holland Boulger* alleges she is the personal Representative of *Abigail Jones* and of said *Charlotte Whitley* :—That *Lloyd Kenyon* was created Baron *Kenyon*, and that he survived *Hugh Whishaw*, and that in 1802 Lord *Kenyon* died, and by his Will appointed his Wife, Baroness *Kenyon*, his Son, the Defendant *George Lord Kenyon*, and his Son *Thomas Kenyon*, Executrix and Executors of his Will ; and that *George Lord Kenyon* alone

proved the same:—That *Ralph Whitley* died long ago, leaving *Anne*, the late Wife of the Defendant *Charles Dundass*, his only Daughter and Heiress at Law; and upon the death of the said *Ralph Whitley*, the said Lands and Tenements descended upon the said *Anne Dundass* (who is since dead), and the said *Charles Dundass* is now seised in fee in possession of the said Lands and Tenements in right of the said *Anne*, subject to and charged with the said sum of 1,000*l.* and Interest.—The *Prayer* of the Bill was, that the Plaintiff might be declared to be entitled to the said sum of 1,000*l.* and the Interest thereon, since the death of Mrs. *Mainwaring*; and that the same might be raised by the said *Charles Dundass* out of the said Lands and Tenements, under the direction of the Court, and paid to the Plaintiff, or to the said *George Lord Kenyon* as Trustee for him.

The Questions raised by the Answers of the Defendants were, whether the two Brothers *Charles* and *Philip Chetwode* took each a vested Interest, as Tenants in common of the Legacy of 1,000*l.*, or whether the surviving Brother took the whole, or whether the Legacy lapsed by the death of both before the Tenant for Life?

Mr. Horne, and Mr. Merivale, for the Plaintiff:—

Both the Brothers died in the life of the Tenant for Life; and the question is, Whether the Representatives of both, or of one Brother, are entitled, or whether the Legacy lapsed?

The Bequest over to the two Brothers gave them

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vested Interests, unless the words "or the whole to the Survivor of them," make a difference. If either died, the Testator meant there should be no division, but that the Money should go to the Survivor. In *Scurfield against Howes* (a) a Legacy was left to *A.* for Life, with a Bequest over to *B.* and *C.*, or in case one should die, living *A.*, then to the Survivor. *B.* and *C.* both died in the life-time of *A.*, and it was held the Legacy was vested and went to the Survivor. On the authority of this Case, the Plaintiff, as Legatee of *Anne Chetwode*, the Legatee of *Philip Chetwode*, is entitled to the whole Legacy of 1,000*l.*

Mr. Benyon, and Mr. Richards, for *Mary Holland Boulger*, the Representative of the residuary Legatee:—

If the Legacy did not vest in both or either of the Brothers, we are entitled to the Money under the residuary Bequest. It was a contingent Legacy, to be paid if both or one of the Brothers survived the Tenant for Life, and they dying before the Tenant for Life, their representatives have no claim. This Legacy is a charge on Land, and when the time of payment is postponed from the circumstances of the Fund and not of the Person, it is vested, otherwise not; but here it is postponed from the circumstances of the Person, it being impossible to know who would be the Survivor of the two Brothers. Neither of the Brothers having survived the Tenant for Life, the Legacy fell into the residue, and belonged to the residuary Legatee.

(a) 3 Br. C. C. 50.

*Mr. Hart, and Mr. Rose, for the Defendants Brouse
and Ux:—*

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*Mr. Bell, and Mr. Blenman, for the Defendant Anne
Bertles:—*

If either of the Brothers had died during the life of the Testator the Survivor would have taken; but as both survived the Testator, they both took vested Interests. It is a general rule, where there are words of survivorship, they relate only to the death of the Testator, unless under special circumstances. In this case it is clear the survivorship applied to the Tenant for Life, so that if one Brother survived the Tenant for Life, he was to take the whole. The case cited only proves that the Legacy did not lapse. If the Legacy did not lapse, there is nothing to show that both the Brothers should not take. They took vested Interests as Tenants in common, and the Representatives of both are entitled in moieties. Where there is a vested Interest to be devested on the happening of a contingency, it continues vested until the contingency happens. Here the contingency was the surviving of the Tenant for Life; and as that contingency did not take place, but both Brothers died before the death of the Tenant for Life, their vested Interests were not devested.

The VICE-CHANCELLOR:—

What the intention of the Testator was must be looked for in the words of his Will: nothing more can be supposed to be intended than what he has expressed. The expression may be often at variance with

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the real intention, and it may be so here, but a Court must decide on the expressed intention.

It has been argued, that this Legacy was given over only on a contingency, and that in the events which have happened the Money must be considered as undisposed of. It is now too late to argue that. The particle *then* is to be applied not to the vesting, but to the possession. The only Question arises, in the Bequest to the two Brothers; on the words, "or the whole to the Survivor." To what period is the survivorship to be applied? It is said to be meant, that if both died during the life of the Tenant for Life, and one only a day before the other, the Survivor was to take the whole, but it is difficult to believe that such could be the meaning of the Testatrix, there being no motive for such a preference. Sir *J. Chetwode* is expressly to take only if he survives the last Tenant for Life; and if he dies before, then she gives the Sum of 1,000*l.* to his two Brothers, in equal Shares, or the whole to the Survivor of them. The obvious meaning is, that if one only survived the Tenant for Life, he should take the whole. It is in expression, therefore, a vested Gift to the two as Tenants in Common, subject to be divested if one alone should survive the Tenant for Life, but which never was divested, because that event did not happen. The two Brothers, therefore, took vested Interests as Tenants in common, and the Money is now divisible between their Representatives. It may be well doubted whether this was the real intention, and whether the Testatrix did mean that either Brother should take any Interest without surviving the Tenant for Life, but the force of the expression is otherwise. Declare that

the Representatives of *Charles* and *Philip Chetwode* are entitled to the Legacy, &c.

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WOOD v. ABREY.

21st Nov.

THOMAS WOOD was Tenant for Life of certain Freehold and Copyhold Estates, with remainder to Trustees to preserve, &c., with remainder to the first Son of *Wood* in Tail, with Remainder to his second Son; with Remainders over.

A Tenant for Life, with a Remainder-man in Tail, both in distress, join in selling the Estate for an inadequate consideration. Held that it could not be considered as the Sale of a reversionary Interest, and subject to the Rules relating to Sales of such Interests; but that the Sale was invalid, on account of the inadequacy of the consideration, coupled with the distress of the Vendors, and their want of advice.

In 1803, *Thomas Wood* granted a Lease of the Freehold and Copyhold Premises to one *Oliver Whitehead* for 21 years, if *Wood* should so long live, at the annual rent of 60*l.*; and *Wood*, being afterwards in want of money, granted two Annuities of 40*l.* and 10*l.* payable during his own Life, and secured on the before mentioned Rent.

Wood, afterwards, owing to the Annuities and the smallness of the Rent, was so much reduced, that he obtained his livelihood as a common porter.

Oliver Whitehead assigned his Lease to one *Mason*, who became Bankrupt, and the Lease was put up to sale by Public Auction by his Assignees, and the Defendant became the Purchaser.

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Some years prior, *Thomas Wood the younger* (the eldest Son of *Thomas Wood the Tenant for Life*, (and first Tenant in Tail,) enlisted in the army, and went abroad, at the age of fourteen.

Abrey having purchased the Lease became acquainted with its value; and *Thomas Wood the younger*, having, in 1807, returned from abroad as a common Serjeant, *Abrey*, knowing the distressed circumstances of *Wood the Father*, and his Son, offered to become the purchaser of the Estate (subject to the encumbrances) for 400*l.*

The two *Woods* being unacquainted with the value of the Estate, and in distress, complied with the proposal; and on the 12th December 1807, they entered into a written Contract, whereby, in consideration of 5*l.* then paid, and of 395*l.* agreed to be paid upon a good Title to the Estate being made, and in consideration of the two Annuities of 40*l.* and 10*l.* payable during the life of *Wood the Father*, they, *Wood the Father and Son*, agreed to convey and surrender said Freehold and Copyhold Lands to the Defendant and his Heirs, and to suffer Recoveries of the same; and it was further agreed, that the *Woods* should pay the expenses attending the Sale, as well of making out a good Title to the Estate, as of all Fines and Fees on the Survivor, and admission to the Copyhold parts, and of the Recoveries to be suffered in the *Manor Court* and in the Court of *Common Pleas*, and of the Conveyance of the Estate to the Defendant

The Agreement was prepared by the Solicitor of the Defendant, no person acting on behalf of the *Woods*,

and no Draft of the Agreement was sent to them previous to their execution of the same.

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The Defendant's Solicitor acted as Attorney for the Woods and the Defendant; and having approved of the Title, Indentures of Lease and Release for the Conveyance of the Freehold Estate were engrossed, and a time appointed for the execution, and for surrendering the Copyhold Estate, and for the Defendant's admission to the same.

On the 10th September 1808, *Thomas Wood* the younger was admitted, at a Special Court holden for the Manor, to the Remainder of the Copyhold Estate expectant on the death of his Father, and he then, together with his Father, surrendered the same to the use of the Defendant's Solicitor to make a Tenant to the *præcipe*, and a Recovery was suffered in the *Manor Court*, and the Defendant was admitted to him, his Heirs and Assigns for ever, and the Fine, 52*l.* 10*s.*, was paid by the Woods. A Recovery was also suffered in Trinity Term 1808, of the Freehold part of the Estate; and shortly after, the Lease and Release were executed by the Woods, without any person having inspected the same on their behalf.

On the execution of the Deeds, the Defendant's Solicitor produced an Account, whereby it appeared that the balance of the Purchase Money, after deducting the expenses of making out the Title, and of preparing the Conveyances and suffering Recoveries, and a sum of 51*l.* stated to have been advanced to the Woods, amounted to the sum of 184*l.*; which sum, together with the 51*l.*, were the only sums paid for the purchase of the Estate.

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Upon the execution of the Indentures of Lease and Release, the Defendant entered into possession of the Freehold and Copyhold Estates.

Wood the younger again went abroad, and was killed in January 1809, and died intestate and without issue, leaving the Plaintiff, his elder Brother and Heir at Law, surviving.

Wood the Father died in November 1812, leaving the Plaintiff, his Heir at Law.

The Bill stating the foregoing facts, further stated, that the Conveyances and Recoveries were obtained by fraudulent representations made to the Woods, and by taking advantage of their distressed circumstances, and that the Purchase Money for the Estate was grossly inadequate.

The *Prayer* of the Bill was, that the Conveyances of the Estate to the Defendant might be declared to have been fraudulently obtained, and might be decreed to be set aside, and that the Defendant might be decreed to deliver up to the Plaintiff the Indentures of Lease and Release, to be cancelled, and that the Defendant might be declared a Trustee for the Plaintiff in respect of the Estate and Premises; and that on payment to him by the Plaintiff of all sums of money actually paid by him to *Wood*, the younger, for the purchase of the Estate expectant upon the decease of the Plaintiff's late Father, *Thomas Wood*, the Defendant might be decreed to re-convey the Freehold part of the Estate, and to surrender the Copyhold part thereof to the Plaintiff and his Heirs, or as he should direct, and to deliver up all the Title and

other Deeds, Papers, Evidences and Writings relating to the same; and that an Account might be decreed to be taken of the Rents and Profits of the Freehold and Copyhold Estates received by the Defendant since the death of the Plaintiff's late Father, and that the Defendant might be decreed to pay to the Plaintiff, what, on the taking of the Account, should appear to be due; and that a Receiver might be appointed in the usual manner to receive the Rents and Profits of the Estate, and that the Defendant might be restrained by Injunction from receiving the same.

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The Defendant, by his *Answer*, admitted the *Woods* were in straitened circumstances, and that *Wood* the Father was reduced to such penury as to obtain his livelihood as a porter, but he denied he took advantage of their distress; the offer to sell the Estate for 400*l.* being made by them; and that *Wood* the Father was acquainted with the value of the Estate, and had tried, but unsuccessfully, to get more for it from others. He admitted he purchased of the Assignees of *Robert Mason*, the Lease, together with a policy of assurance for payment of 500*l.* on the death of *Thomas Wood* the younger. He further stated, that before he entered into the Contract, he had paid to *Wood* the younger 100*l.* as a consideration for confirming and making absolute the Lease of the Premises for twenty-one years, which before the confirmation was determinable on the death of *Wood* the elder:—That the Agreement for the sale of the Estates, was, by the desire of the *Woods*, sent up to *London*, and was signed by the *Woods* at the house of the Agent of the Defendant's Solicitor, in his and his Clerk's presence, and the 5*l.* paid them:—That he is a fair and *bonâ fide* Purchaser for a valuable consideration:—

CASES IN CHANCERY.

1818.

Wood
v.
Asbury.

That in case the Premises had been unencumbered by the Lease, and two Annuities of 40*l.* and 10*l.*, they would not have been worth more than 13 or 1,400*l.*:— That he has made no profits from the Estate since the purchase, and has expended a considerable sum in repairs and buildings.

The *Answer* was replied to, and many Witnesses were examined on each side, as to the adequacy of the price given for the Estates by the Defendant; the result of which Evidence, as it affected the mind of the Court, is stated in *His Honor's Judgment*.

Mr. *Fonblanque*, Mr. *Bell*, and Mr. *Pugh*, for the Plaintiff.

Mr. — for the Defendant.

The VICE-CHANCELLOR [after a brief statement of the Case]:—

The Plaintiff's Counsel first insisted, that he was entitled to be relieved on the ground of the Purchase being of a Reversion, unless the Defendant could show that the Purchase was for an adequate consideration.

The policy of this Rule, as to Reversions, may be well doubted; and if the Cases were looked into, it might be found that the Rule was originally referred only to expectant Heirs, and not to Reversioners. But the Rule has no application here. It proceeds upon the notion that he who has only a future Interest to sell does not meet a Purchaser upon equal terms. But here the Father, Tenant for Life, and his Son, Tenant in Tail in Remainder, concurring together to sell the Estates, form a Vendor with a present Interest, and

meet a Purchaser with the the same advantages as if a single Person had the whole power over the Estate.

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Woods

v.

Abrey.

With respect to value, mere inadequacy of price is of no more weight in Equity than at Law. If a man who meets his Purchaser on equal terms, negligently sells his Estate at an under value, he has no title to relief in Equity. But a Court of Equity will inquire whether the Parties really did meet on equal terms; and if it be found that the Vendor was in distressed circumstances, and that advantage was taken of that distress, it will avoid the Contract. In the present case, the distress of the Vendors is out of all doubt. [His Honor then mentioned the evidence respecting their situation.]

It appears also that the Woods had not the benefit of any Professional assistance; and that the only Professional Person employed was the Defendant's Attorney.

It appears further, that the price paid was grossly inadequate. According to the evidence of Mr. Morgan and the other Witnesses for the Plaintiff, the Defendant bought for 400*l.* what was worth 1,600*l.*; and if I were to give implicit credit to the Defendant's Witnesses, still, according, to their valuation, the Estate was worth greatly more than the Purchase Money. But their Evidence is grounded on inadmissible premises. It is made on the supposition that the Estate was out of repair. But the Lessee, who is the Purchaser, was bound by Covenant to keep it in repair.

CASES IN CHANCERY.

1818.WOOD
v.
ASHEY.

I consider, therefore, this Plaintiff entitled to relief, not on the ground of its being the Sale of a Reversion, but because the purchase was made at an inadequate price from Vendors who were in great distress, and without the intervention of any other professional assistance than the Purchaser's Attorney; and because these circumstances are evidence that in this Purchase advantage was taken of the distress of the Vendors. The Conveyances must be set aside, upon the Plaintiff repaying the amount of the Purchase Money, and the expenses of the Recovery, with Interest at five per cent.; and although, I cannot, after the Cases which have been decided, make the Defendant pay Costs, I cannot bring my mind to give to a Defendant the Costs of a Suit made necessary by his unfair dealing.

1818.

JOSEPH GARDINER, (Executor of the Reverend
STEPHEN GAGE, deceased) - - - Plaintiff;

And

SUSANNAH BUT, JEREMIAH MICHAEL EVANS,
and **WILLIAM ANDERSON** and **ELIZABETH**
his Wife - - - - - Defendants.

ROBERT OXLADE, deceased, by his Will, 20th February 1796, after several Bequests, gave all the rest, residue and remainder of his real and personal Estates unto his Sister *Susannah But*, then the Wife, and now the Widow of *Benjamin But*, and appointed *John Wyllie* and the Reverend *Stephen Gage* his Executors.

By a third Codicil to the Will, 27th November 1797, he bequeathed as follows: "I give unto my Executors *John Wyllie* and *Stephen Gage*, and the Survivor of them, the sum of 1,000*l.* Stock, now standing in my name in the 4 per-cent. Bank Annuities, in Trust, for my two Nieces *Elizabeth* and *Susannah Oxlade*, Daughters of my late Brother *George Oxlade*, and to pay them the Dividends thereof from time to time as the same shall become due and payable; and from and after the decease of my two Executors, I give and bequeath the said 1,000*l.* Stock unto my said two

*Nov. 24th.
Gift to two
Executors and
the Survivor, of
1,000*l.* four
per cents. in
Trust for Testa-
tor's two Nieces,
to pay them the
Dividends thereof
from time to time,
and from and
after the decease
of the two Exe-
cutors, the 1,000*l.*
Stock to go to the
two Nieces, their
Executors, Ad-
ministrators and
Assigns, equally.
Held that the two
Nieces took abso-
lute equitable*

*Interests in the Stock, as Tenants in Common, during the life of the Executors,
and that on their deaths, they took absolute legal Interests as Tenants in Common.*

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and others.

Nieces, their Executors, Administrators and Assigns, equally to be divided between them; and in all other respects I ratify and confirm my Will."

The Testator died, and his Will and Codicils were proved by the Executors.

Wyllie, one of the Executors, died, and afterwards *Gage*, the other Executor, died, leaving the Plaintiff and another his Executors, but the Plaintiff alone proved his Will, the other Executor having renounced.

Elizabeth Oxlade, the Testator's Widow, married the Defendant *William Anderson*; and *Susannah Oxlade*, one of the Testator's Nieces, married *Samuel Evans*. Mrs. *Evans* afterwards died, leaving her Husband surviving, who obtained Letters of Administration to her, and he afterwards died in the lifetime of the Executor *Stephen Gage*, and appointed his Brother *Jeremiah Michael Evans* his Executor and Residuary Legatee, and he proved his Will.

After the death of *Samuel Evans*, Letters of Administration of the unadministered Effects of *Susannah Evans* were granted to *Elizabeth Anderson*, her Sister.

Wyllie and *Gage*, during their joint lives, and *Gage*, after the death of *Wyllie*, regularly paid to the Defendant *Elizabeth*, the Wife of the Defendant *William Anderson*, one Moiety of the Dividends on the Legacy of 1,000*l.* 4 per-cent. Bank Annuities, and also paid to *Susannah Evans*, during her life, the other Moiety of such Dividends; but after her death no Dividends were paid of one Moiety, by reason of the contradictory claims to the same.

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The Plaintiff paid one Moiety of the Legacy to *William Anderson* and *Elizabeth* his Wife.

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GARDINER

v.

BUT

and others.

The Bill stating these facts, further stated, that the Defendant *Susannah But*, who survived her Husband, claims the Dividends, and also a Moiety of the Stock, under the residuary Bequest in the Will, as not having been disposed of in the Events which have happened; and that the Defendants *William Anderson* and *Elizabeth* his Wife, allege that on the death of *Susannah Evans*, they, or one of them, became, in their own Right, entitled to the Dividends of the Moiety which accrued during the life of *Stephen Gage*, but that *Jeremiah Michael Evans*, as the personal Representative of *Samuel Evans*, who survived his Wife, claimed to be entitled to the whole of the Dividends remaining unpaid, and also to a Moiety of the Legacy.

The *Prayer* of the Bill was, that the Rights of the several Parties might be ascertained and declared.

The Defendants, by their *Answers*, insisted on their respective claims, in the manner mentioned in the Bill.

Mr. *Heald*, and Mr. *Buck*, for the Plaintiff.

Mr. *Wray*, for the Defendants, *Anderson* and *Ux.*

Mr. *Fonblanque*, and Mr. *Purvis*, for the Defendant, *Jeremiah Michael Evans.*

Mr. *Pepys*, for the Defendant, *Susannah But.*

The VICE-CHANCELLOR:—

Absolute *equitable* Interests, as Joint Tenants, are given in the beginning of the third Codicil, to the Tes-

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GARDINER
v.
BUT
and others.

tator's two Nieces, *Elizabeth* and *Susannah Oxlade*. The Stock is given in Trust for them, with a direction that the Dividends should be paid to them from time to time. Upon the death of the survivor of the Executors the Trust determines, and the Nieces take absolute *legal* Interests, as Tenants in Common; the consequence is, that the Defendant *Jeremiah Michael Evans*, as the Representative of the husband of *Susannah Oxlade*, is entitled to the 500*l.* 4 per-cents. and the Dividends due thereon.

28th Nov.

SMITH and others v. BRYON.

A Demurrer to an amended Bill need not be intituled as a Demurrer to the original and amended Bill, but as a Demurrer to the amended Bill.

THIS was a Motion, on the part of the Plaintiffs, to take a Demurrer off the File, because intituled only as a Demurrer to the amended Bill, it being insisted, that it ought to have been intituled as a Demurrer to the original and amended Bill. The Certificate of the Officer stated, that *Smith*, on the 26th of June last, filed his Bill: that by Order he amended it on the 31st of October: that the Defendant, on the 17th instant, had demurred, and that no further Proceedings had been had in the Cause.

Mr. *Bell* and Mr. *Wakefield*, in support of the Motion, stated the Title of the Demurrer, "The Demurrer of *James Bryon*, the Elder, the Defendant, to the amended Bill of Complaint of *Thomas Smith* and *Edward Harpur*, and *Mary Watkins*, his Wife, the Complainants;" contending, that it was no Demurrer to the *Original Bill*.

Mr. Beames, in opposition, was stopped by

1818.

The Vice-Chancellor, who said, that the Demurrer was sufficiently intitled. That the original Bill had become nugatory by the amendment; and that the Defendant was not bound to notice it in an Answer or Demurrer, although it was frequently done.

Motion refused, with Costs.

6th Dec.

CONE THARD v. HASTED.

AFTER Publication, which had been enlarged at the instance of the Defendant, passed in this Cause, an Order, as of course, was obtained by the Defendant again to enlarge Publication, and Witnesses were afterwards examined. This Order being informal, Publication having previously passed, a Motion was now made by the Defendant, that Publication might be enlarged to the 9th, or that the Depositions taken under the informal Order might be ordered to be read at the hearing of the Cause. The Motion was supported by an Affidavit that the Depositions had not been seen.

The VICE CHANCELLOR :—

It is not to be permitted that the Practice should be wilfully departed from.

When by accident or surprise Publication passes before the Defendant has examined his Witnesses, and there has been no blamable negligence, the Court will allow Witnesses to be examined, on an Affidavit that the Depositions have not been seen. In this Case, the

After Publication passed, and which had been before enlarged at the instance of the Defendant, he obtained an Order as of course, again to enlarge Publication, and examined Witnesses. Held, that the latter Order was informal; and an application that Publication might be further enlarged, or the Evidence taken under the informal Order might be read at the hearing of the Cause, was dismissed with Costs.

CASES IN CHANCERY.

1818.**CONE THARD***v.***HASTED.**

Defendant obtained leave to enlarge Publication, but he neglected to examine Witnesses within the time to which the Publication was enlarged. Publication passes, and then the Defendant obtains, irregularly, an Order, as of course, to enlarge Publication. He was told of the irregularity, and then, instead of correcting his error, he persists in examining his Witnesses, and now makes the present application to give effect to their testimony. There is no title to this indulgence. I must dismiss this application, with Costs.

VAN KAMP v. BELL.

8th Dec.

A Cause cannot be set down for further directions on a separate Report. An order on a separate Report must be sought by Petition.

BY the Decree in this Cause, it was amongst other things directed, "That the *Master* should make a separate Report as to the Monies arisen from the Sale of such part of the Testator's Freehold or Copyhold Estates, if any, as were not mentioned in his Will."

The *Master* made a separate Report, and a Petition was presented by the Plaintiffs, at the Rolls, to confirm it, and for directions consequential on such Report; and the Petition was heard, and stood for Judgment.

The Plaintiffs (dissatisfied, as it was said, with the opinion which the *Master of the Rolls* appeared to entertain,) afterwards set the Cause down for further directions on the *Master's* separate Report.

A Motion was now made that this Cause, which stood in the *Lord Chancellor's* General Cause Book for further directions, might be struck out, the same being set down by the Plaintiffs irregularly.

1818.

VAN KAMP
v.
BELL.

The Question was, Whether the separate Report ought to be brought on for the consideration of the Court by Petition, or by setting down the Cause for further directions ?

The VICE CHANCELLOR:—

The Decree in this Case follows the common language of such Decrees, that the consideration of all further directions shall be reserved until after the *Master* shall have made his general Report. The Cause cannot therefore be set down for further directions on the separate Report; but any order upon the separate Report must be made upon a Petition.

Motion granted.

1818.

UNSWORTH v. WOODCOCK.

8th Dec.

Production of Books, &c. referred to in Answer, ordered, though contended that the Answer showed the Plaintiff was not entitled to relief.

A MOTION was made for the production of Books, Papers and Writings, mentioned in the Defendant's Answer. This was opposed on the ground, that though the Defendant answering at all, was bound to answer fully, yet, that if by his Answer, the Defendant insists that the Plaintiff is not entitled to the Account he seeks, the Court will not compel him to produce Books, &c. until the Plaintiff has established his title to the Account on the hearing of the Cause.

The VICE-CHANCELLOR:—

I can make no such distinction. The Plaintiff might compel the Defendant to set out the contents of the Books in his Answer, and the production of the Books is a part of the discovery, which the Defendant submitting to answer, submits to make. The Motion must be granted.

Mr. Roupell, for the Motion.

Mr. Bell, contra.

1818.

MILLARD v. MAGOR.

8th Dec.

MR. SHADWELL moved, upon the Stat. 7 Geo. II. c. 20, for a reference to the *Master*, upon a Bill of Foreclosure.

Mr. Parker insisted that the *Master* should be directed to take into the Account the Costs incurred by the Defendant in proceedings at Law, in Ejectment.

Mr. Shadwell, in reply:—

The Act says, the Court, upon such an application as this, shall make such Order or Decree as the Court might have made if the Suit had been brought to a hearing. In this case, if the Suit had been brought to a hearing, no account could have been directed of the Costs at Law, no mention of any Actions at Law being made in the Statements in the Bill, or mentioned in the Prayer.

The VICE-CHANCELLOR:—

As no mention of any Actions at Law, or Costs incurred, is made in the Bill, I cannot order the *Master* to take such Costs into the Account; but I will give the Plaintiff leave to amend his Bill in that respect, and let this Motion stand over until the Bill is amended.

On a motion for a reference under the Statute 7 Geo. II. c. 20. the Court refused to direct the Master to take into the Account, Costs incurred at Law, no mention of proceedings at Law being made in the Bill; but the Court gave leave to amend the Bill in that respect, and directed the Motion to stand over until the Bill was amended.

1818.

LORD WESTMEATH v. LADY WESTMEATH.

10th Dec.

Depositions taken in a Cause where a Tenant in Tail was Defendant, are binding on another Tenant in Tail, who came in esse before a Decree, and who took as Tenant in Tail prior to the former Tenant in Tail, who had been made a Defendant.

IN this Suit, the Tenant in Tail, a Daughter, was made a Defendant, and Depositions were taken, and publication passed ; and the Cause was set down for hearing. Two days before the Cause would have been heard, a Son was born, who became Tenant in Tail before his Sister.

A Supplemental Bill was filed, making the Son a Party ; and the question was, whether the Depositions taken on the Original Bill could be used against the Son, who was made a Party by the Supplemental Bill ? The Vice-Chancellor held that the Depositions might be read against the Son, that if a Decree had been made, and a new Tenant in Tail had then come in *esse*, the Decree made upon the Deposition would have been clearly binding on him ; and though coming in *esse* before the Decree, he must be bound by the proceedings so far as they were completed.

1818.

WITHEY v. HAIGH.

12th Dec.

IN this Case it was held, that when the Court is moved for the payment of Costs, under the General Order of the 5th August 1818 (*a*), on account of a Notice of Motion which has been abandoned, such Notice of the Motion must be mentioned to the Court, and must also be produced to the *Register* before he draws up the Order.

(*a*) See this Order *ante*, p. 318.

MARSH v. HUNTER.

12th Dec.

THIS was a Motion by Mr. Parker, to take an Answer off the File, only two unimportant facts being answered, and the rest of the Bill remaining unanswered. He cited *Tomkin v. Lethbridge* (*b*) in which the Lord

(*b*) 9 Ves. 178, and S. C. lib. 463, and in MS.; and see what is said in *Baker v. Mellish*, 11 Ves. in page 72, 3; but in *Smith v. Serle*, 14 Ves. 415, a Case not cited on the Argument of the prin-

cipal Case, the *Lord Chancellor*, alluding to *Tomkin v. Lethbridge*, and a Case before *Lord Thurlow*, said, "I am so unwilling to give any countenance to such an abuse of the Practice, that I think I

A Motion can not be made to take an Answer off the File, because it is delusive, answering only a few facts stated in the Bill. Exceptions must be taken.

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MARSH
v.
HUNTER.

Chancellor said, "that if this should happen again, a general Order should be made to prevent it in future, to this effect; that wherever it can be shown that the Answer is mere delusion, it should be understood to be the Practice to take it off the File."

Mr. *Wakefield, contra*, was stopped by

The VICE-CHANCELLOR:—

In *Tomkins v. Lethbridge*, the *Lord Chancellor* stated his opinion as to the propriety of a new general Order to correct this abuse, but no such general Order has yet been made; and the *Lord Chancellor's* opinion admits, that the present application is not warranted by the existing practice.

Motion refused, but no Costs given.

never shall be induced, upon both those Authorities, to make such a decision again, and if such an attempt should be repeated, shall hold it to be no Answer;" and in that Case his Lordship referred it to the

Master to see whether the Answer was substantially an Answer, and said, "When the Inquiry is short, I should not scruple to compare the Answer myself, for the purpose of doing justice."

BOWKER v. NICKSON.

12th Dec.

MR. Horne and Mr. Wakefield moved for leave to take Exceptions to the *Master's Report*, the Clerk in Court having neglected to give the Solicitor notice of the Warrant which had been served upon him, fixing a day when the Draft of the *Master's Report* would be settled, whereby the Solicitor lost the opportunity of carrying in Objections to the Draft of the Report, which it was necessary to do to entitle the Plaintiff to except.

If, by mistake or surprise, Objections are not carried in upon a Warrant to settle the Master's Report, the Court will allow the party to file Exceptions.

Mr. Sugden, *contra*.

The VICE-CHANCELLOR:—

It is necessary Objections should be taken to the Draft of the Report, before the Party can except, in order that the Master may have an opportunity of re-considering his opinion, and it is not form but substance; but, if by accident or surprise that has not been done, the Court will give the Party leave to except. It is sworn by the Attorney, that the Clerk in Court did not send to him the Warrant which had been served, fixing a day for settling the Draft of the Report. If that be so, it would not be just to exclude the Party from objecting to the Report, because the Clerk in Court was negligent. Let the Clerk in Court make an Affidavit that he did not send the Warrant to the Attorney, or give him any communication of it. If such Affidavit is produced, the Plaintiff may take his Motion, paying the

1818.

Costs of it; but if no such Affidavit is produced, the Motion must be dismissed with Costs (a).

BOWKER

v.

NICKSON.

HUDSON v. BARTRAM.

13th Dec.

Time may be made of the essence of a Contract, but though made so, yet the strict performance of the Contract may be waived by conduct.

AN Injunction had been obtained in this Cause. The Answer being put in, the Plaintiff now moved to dissolve the Injunction, upon the merits.

The Bill stated the following Agreement between the Parties, viz. " Memorandum of Agreement made the 24th day of March 1818, between *John Thomas Bartram* of one part, and *Joseph Hudson* of the other part. The said *John Thomas Bartram*, for the Considerations hereinafter expressed, agrees to grant, at the time and upon the terms hereinafter mentioned, unto the said *Joseph Hudson*, a Lease of all that Messuage or Tenement and Premises, situate No. 132 Oxford-street, now in the Occupation of the said *Joseph Hudson*, for the term of 35 years, wanting seven days, from the sixth day of April now next, at a Rent of 110*l.* payable quarterly, that is to say, on the 6th of July, the 11th of October, the 6th of January, and the 6th of April, free and clear

(a) In Carter v. Clitheroe, M.S. where by surprise (as to which there was an Affidavit of the Defendant's Solicitor) before Objections were taken, Lord Hardwicke referred it back to the Master to receive Objections.

the Master signed his Report

of the Land Tax, and all other Taxes, Charges and Assessments whatsoever, the first quarterly payment of the said Rent to be made on the 6th of *July* now next. And it is agreed that such Lease shall contain all usual Covenants; and also all such Covenants, Conditions, Stipulations, Provisoes and Agreements as are contained in the original Lease from the *Duke of Portland* to the said *John Thomas Bartram*; and also a Covenant by the said *Joseph Hudson*, not to let the said Premises, or any part thereof, to a Goldsmith, Silversmith, Watchmaker, or Jeweller, at any time during the first fourteen years of the said Term, nor permit or suffer such Trades, or either of them, to be carried on therein; also a Proviso to render the said Lease void, in case of breach of such Covenant: and as a Consideration for granting the said Lease, the said *Joseph Hudson* hereby agrees to pay to the said *John Thomas Bartram*, the sum of 900*l.*, in manner following; (that is to say) 100*l.* upon the signing of this Agreement; 400*l.* by the Acceptance of the said *Joseph Hudson*, payable, with legal Interest, to the Order of the said *John Thomas Bartram*, in three months from the date hereof; and 400*l.* by a like Acceptance, payable, with legal Interest, in six months from the date hereof: and the said *John Thomas Bartram* agrees to execute the said Lease to the said *Joseph Hudson*, upon the Terms aforesaid, at the expiration of the said six months, provided the whole of the said 900*l.* shall then be fully paid and satisfied; but in case the whole of the said 900*l.* shall not be fully paid to the said *John Thomas Bartram*, on or before the expiration of such six calendar months, it is hereby agreed, that this present Agreement, as to the granting of such Lease by the said *John Thomas Bartram* to the said *Joseph Hudson*, shall be void; and that the said

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Joseph Hudson shall deliver up the quiet Possession of the said Premises, to the said John Thomas Bartram, on or before the 30th day of September now next ensuing the date hereof, and forfeit and pay to the said John Thomas Bartram the sum of 150 l., as and by way of Compensation for breach of this Agreement, and for the use and occupation of the said Premises until that time; and in case the said Joseph Hudson shall not quietly deliver up the Possession of the said Premises, on or before the said 30th day of September, that he shall forfeit and pay unto the said John Thomas Bartram the sum of 500 l., as and by way of liquidated Damages, and which may be retained by the said John Thomas Bartram, out of so much of the said 600 l. as may then have been paid, or be recovered by the said John Thomas Bartram, by Action at Law upon this Agreement, in the event of the said John Thomas Bartram not having the quiet possession given to him on that day. And it is agreed, upon the payment of the said 600 l., and the execution of the said Lease by the said John Thomas Bartram to the said Joseph Hudson, he the said Joseph Hudson shall and will execute a Counterpart of the said Lease, and pay the Charges of preparing this Agreement, and the said Lease and Counterpart to be prepared by the Solicitor of the said John Thomas Bartram."

The Bill further stated, that, on the signing of the Agreement, the Plaintiff paid 100 l. to *Bartram*, and accepted two Bills of Exchange, drawn by the Defendant upon the Plaintiff, dated 24th March, 1818; one, for the sum of 405 l., payable three months after date; the other, for 400 l., payable six months after date:—That the Plaintiff was, when the Agreement was made, and hath ever since been, and now is in the Pos-

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v.
BARTRAM.

session of the Premises, and hath laid out 100*l.* in Repairs, and carries on the business of a Tobacconist:—That the Plaintiff duly paid the Bill for 405*l.*, and that in August 1818, before the other Bill of Exchange for 410*l.* became due, the Plaintiff was under the necessity of going to *Germany*, and in the hurry of his departure, omitted to make provision for the Bill of Exchange for 410*l.*; but on the 11th September 1818 sixteen days before the Bill became due, sent a Letter from *Berlin* to the Defendant, stating it would be impossible for him to return to *England* in time to take up the Bill, but that he would return in three weeks after the Bill would become due, and would then take it up:—That the Defendant returned no answer to the Letter:—That the Plaintiff arrived in *London* on the 21st October 1818, and on that day wrote to the Defendant, stating he had just arrived, and that he would wait on him the next morning and take up the Bill; that he accordingly called, but the Defendant was not at home, nor had left any message; Plaintiff left word he would call the next morning at eleven, which he did, but was informed the Defendant was out; that on the 23d October 1818, the Plaintiff received a Letter from the Defendant, saying that Business would prevent him from being at home the next morning, but that he would be at home at seven in the evening; that Plaintiff was about to leave his house the next day to wait upon the Defendant according to his appointment, when Defendant's Shopman came with a message from Defendant, saying, he was obliged to go out of town, and would not be at home that evening, and thereupon the Plaintiff told the Shopman he would call upon the Defendant the next day, the 24th, at seven o'clock in the evening; but that at five o'clock in the evening of that day, the Plaintiff

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HUDSON
v.
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received the following Letter from the Defendant's Attorney :—“ Sir, The Agreement entered into by you with Mr. *Bartram*, not having been fulfilled on your part, Mr. *Bartram* directs me to demand the Possession of the Premises, agreeably to the terms of such Agreement: you will remember that the Penalty for breach of the Agreement in the first instance, is 130*l.*, and in the event of your not delivering Possession when demanded, the further Sum of 500*l.*; I trust therefore you will send the Key to Mr. *Bartram* without delay.”—That during the Plaintiff's absence in *Germany*, his business as a Tobacconist was conducted upon the Premises by his Servant; and that a few days before the Plaintiff's return, and after the Bill for 410*l.* had become due several days, the Receiver of the Rents of the Duke of *Portland*, wrote to the Defendant, requiring payment of 55*l.* half a year's Rent for the Premises, and that Defendant upon receiving such Letter, left it at the Plaintiff's house, with directions for the Plaintiff to pay such Rent; and when he left such Letter, he had received the Plaintiff's Letter, written from *Berlin*; and on the 27th October 1818, the Plaintiff, with the privity and knowledge of the Defendant, and according to his directions, paid the Receiver the Rent, and received a Receipt as for so much Rent received of the Defendant by the hands of the Plaintiff:—That the Plaintiff is ready to perform his part of the Agreement, and hath offered to pay the Bill for 410*l.* and Interest, and hath applied for a Draft of the Lease, but no such Draft hath been sent:—That in November 1818, an Ejectment was brought against the Plaintiff, to recover Possession of the Premises, and that the Defendant threatens to proceed to Judgment and Execution, and also threatens to proceed for the recovery of the Penalties mentioned in the Agreement:—That on the

2nd November 1818, the day on which the Action of Ejectment was brought, the Plaintiff received the following Letter from the Defendant's Solicitor :—“ *Bartram v. Hudson*.—Sir, in reply to your note herein, I am directed by Mr. *Bartram* to say, he insists upon the Possession being given, and at the same time he desires me to observe, that if such Possession is given him immediately, he will not claim the full Penalties; but this offer is made without prejudice to his right, to the full extent of the Agreement, and to the whole of the Penalties given by it:” to which Letter, the Plaintiff's Solicitor replied as follows; “ In the matter of *Hudson v. Bartram*.—Sir, I mentioned to you in my last, that Mr. *Hudson* was ready and willing to complete his Contract with Mr. *Bartram*, and requested you to send me a Draft of a Lease for my perusal on Mr. *Hudson*'s behalf, that the matter might be settled without delay; instead of which, I find you have delivered a Declaration in Ejectment; I have now to inform you, and you are to take notice, that if you do not comply with this his reasonable request, I shall be obliged to apply to a Court of Equity for relief; and expecting to hear from you before the first day of Term, I am, &c.”

The *Prayer* of the Bill was, “ That the Defendant might be decreed to execute and deliver to Plaintiff a proper Lease of the said Messuage or Tenement and Premises, agreeably to the Terms and Conditions of the written Agreement, Plaintiff being ready and willing, and thereby offering to execute and deliver to Defendant a Counterpart of such Lease, and to pay to him the said Sum of 410*l.*, the amount of the said Bill of Exchange, which was so, as aforesaid, not paid by Plaintiff as and when the same became due, together with

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Interest from such time as this honourable Court shall think just, and also to pay the Expense of preparing the said Agreement and Lease; but if this honourable Court shall be of opinion that the said Agreement has on the part of Plaintiff become forfeited, then that it may be declared, that in Equity Plaintiff is entitled to be relieved against said Forfeiture, Plaintiff in that case being ready and willing, and hereby offering to make Defendant such compensation or satisfaction as this honourable Court shall please to direct, for the damage or expense (if any) the said Defendant has sustained by reason and in consequence of the said Bill of Exchange for 410*l.* not having been paid, when the same became due; and that Defendant may be restrained, by the Order and Injunction of this honourable Court, from further proceeding in the said Action of Ejectment so commenced by him against Plaintiff as aforesaid, and from all other Proceedings at Law against Plaintiff, touching any of the matters aforesaid, and that Plaintiff may have such other and further relief, &c."

The *Answer* of the Defendant, admitting the principal facts mentioned in the Bill, stated, That he received the Letter from *Berlin* on the 28th September 1818; that he left the Letter from the Duke of *Portland's* Steward, demanding the Rent, at the Plaintiff's house, but notwithstanding any directions; and admitted, that before he left such Letter he had received the Letter from *Berlin*, and that the Bill for 410*l.* was due before he left such Letter.

Mr. *Horne*, and Mr. *Barber*, in support of the Injunction.—

In order to support the Injunction, we must show either that the Agreement has been strictly performed,

or that the Defendant has waived such strict performance. We contend for the latter proposition. Leaving the Letter of the Duke of *Portland's* Steward, and being privy to the payment of the Rent after receiving the Letter from *Berlin*, and after the Bill for 410*l.* was due, showed that he considered the Contract as subsisting, and operated as a waiver of the Forfeiture. If it even be doubtful whether the Court will relieve at the hearing, the Injunction will be continued.

Mr. *Heald*, and Mr. *Rose*, *contra*, contended the Agreement was clear; that a Forfeiture had been incurred, and that the same could not be considered as waived; that the Agreement by the non-performance of it became altogether void, and the subsequent payment of Rent did not revive the Agreement.

The VICE-CHANCELLOR, [after stating the facts of the Case]:—

Although it was long doubted whether time could be made of the essence of a Contract, yet that point has been settled by Lord Eldon. Here, as at Law, it may be of the essence of the Contract. The Defendant might in this case have insisted, that the Agreement was determined; but it is contended that his conduct manifests, that he consented, as he might do, to waive that right. It is not necessary, for the purpose of continuing the Injunction, that it should be clear that relief will be given at the hearing, it is sufficient that there is ground for supposing that relief may be given; and if so, the Court will not allow the Possession to be changed in the meantime. The Letter from *Berlin* was received on the 28th; on the 30th, Possession was to be delivered. If the Defendant

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meant to insist on the strict fulfilment of the Agreement, he should have demanded Possession on the 30th; it was necessary he should do so, to entitle himself to the 500*l.* liquidated Damages. Then, he sends the Letter of the Duke of *Portland's* Agent to the Plaintiff. Was it consistent that the Plaintiff should pay the Rent, if the Agreement was at an end? If the Agreement continued, the Plaintiff must have paid the Rent; but if the Agreement was at an end, the Defendant instead of calling upon the Plaintiff to pay the 55*l.* Rent, should have considered himself as a Debtor to the Plaintiff in 350*l.*, the amount due in respect of the 500*l.* which had been paid, after deducting 150*l.* according to the Agreement. It is clear, therefore, that at that time the Defendant treated the Agreement as still subsisting. The Plaintiff calls upon the Defendant immediately on his return from abroad, proposing, to pay the outstanding Bill; and the Defendant, did not then insist on the termination of the Agreement.

Let the money due on the unpaid Bill be paid into Court within a week, and let the Plaintiff give a Judgment in the Ejectment, so that if he does not succeed in the Suit, the Defendant may immediately take out Execution; and on these terms, let the Injunction be continued until the hearing of the Cause.

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Between GILES BORRETT and HARRY VERELST
 WORSHIP, MARY ANN SIMONDS, an Infant, by
 the said GILES BORRETT and HARRY VERELST
 WORSHIP, her Guardians and next Friends,
 WILLIAM COAK and FRANCES his Wife, late
 FRANCES SWALES, JAMES SWALES, GEORGE
 SWALES, WILLIAM SWALES, THOMAS
 SWALES, and MARGARET SWALES, Infants,
 by the said WILLIAM COAK, their next Friend,
 JOHN LIBBIS and MARGARET his Wife, late
 MARGARET FLEMING, and ROBERT FLEM-
 ING, - - - - - Plaintiffs;

And,

JAMES DEADY, RICHARD LATHAM, and JAMES
 BRIDGES, an Infant, by THOMAS JAGO his
 Guardian, - - - - - Defendants.

By Original Bill, and Bill of Revivor.

THIS Cause came on for further directions upon the
Master's Report.

William Simonds, by his Will, after certain specific
 Bequests, bequeathed unto the Defendants, *Deady* and *Latham*, all the rest residue and remainder of
 his Estate and Effects, to sell the same, and place
 out the Monies arising from the Sale, upon Govern-
 ment or other sufficient Security, in their own Names,

10th November.
Where a Testator directs his Executors to convert his Property and invest it in Stock, and thereout to pay an Annuity of 250 l. to his Widow for her life, and after her death, gives

*the principal Sum that produced the Annuity over; and the Property be not in fact sold or invested till after the death of the Widow, the Legatees over are entitled to as much of the Stock as would produce to 250 l. a year in Divi-
 dends, and not merely to a principal Sum of 5,000 l.*

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upon Trust, that they should, out of the Rents and Profits thereof, or the Money so to be received, pay to the Testator's Wife, the Defendant *Mary Simonds*, during her life, a clear Annuity of 250*l.* and after her death, to pay the Principal of said 250*l.* unto the Testator's Brother, *Robert Simonds*, his two Sisters, *Frances Swales* and *Margaret Fleming*, and unto all their Children that should be living at the time of his decease, to be equally divided between them, share and share alike; but if any or either of them should die, then the Share or Shares of him her or them so dying to go to and be divided equally among the Survivors or Survivor of them: Also upon Trust, to pay unto his, said Testator's, Father, Mr. *Robert Simonds* (now deceased), for the term of his natural life, the clear Annuity of 20*l.* by half-yearly Payments: Upon Trust, to pay unto Mrs. *Pain* (now also deceased) the clear Annuity of 10*l.* for the term of her life (both of which Annuities have been paid and satisfied up to the last day of payment thereof respectively). The Testator, after bequeathing pecuniary Legacies (all of which have been paid and satisfied), directed his Trustees or the Survivor of them, to pay, assign, transfer and convey the residue of his Estate and Effects, and the Interest, Dividends, and Produce thereof, or such part thereof as should remain unapplied as thereinbefore mentioned, unto his said Brother and two Sisters, to be equally divided between them, share and share alike; and in case any of them should happen to die, then the Share or Shares of him her or them so dying should go and be divided between the Survivor or Survivors of them.

The Testator died 17th October 1809, leaving *Mary* his Widow, said *Robert Simonds* his Brother

(since deceased), and *Frances the Wife of James Swales* (since also deceased), and the Plaintiff *Margaret Libbis*, then *Margaret Fleming*, his Sisters, him surviving: and that the Plaintiffs, *Mary Ann Simonds*, *Frances the Wife of William Coak* (then *Frances Swales*), *James Swales*, *George Swales*, *William Swales*, *Thomas Swales*, *Margaret Swales*, *Harris Fleming*, and *Robert Fleming*, who were all the Children of the said Testator's Brother, *Robert Simonds*, and his Sisters, *Frances Swales* and *Margaret Libbis* respectively, who were living at the death of said Testator. *Robert Simonds*, the Testator's Brother, died in February 1813, having made his Will, and appointed *Ann Simonds* his Wife (since deceased), and the Plaintiffs, *Borrett and Worship*, his Executors, who proved same. *Frances Swales*, the Wife of said *James Swales*, died in July 1812, leaving *James Swales* her Husband, who died in December 1814, and the Plaintiff *William Coak* obtained Letters of Administration to him. *Mary Simonds*, the Testator's Widow, died 23d January 1816, and said Annuity of 250*l.* given to her by said Testator, was paid to her by the Defendants the Executors to the time of her decease, out of the said Testator's Estate; but they did not convert or invest the same according to the directions of the Testator's Will, in her life-time; and the *Master* by his Report stated, that it did not appear that the directions in the Will of the Testator, respecting the residue of his Estate, viz. to place the same on Government or other good and sufficient Securities, in the names of his Executors, or in such manner as they should think proper, were in any manner executed.

The Sum of 7,852*l.* 3*s.* 6*d.* Three per cent. Annuities, was standing in the Name of the *Accountant General*,

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on the credit of this Cause; and the Executors admitted to have in their hands the Sum of 761*l.* 7*s.* 10*d.*

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The *Master* by his Report stated, that it being questionable what sum of Stock or Money the Persons described in the Testator's Will as the Legatees, after the death of his Wife, of the Principal of the Annuity of 250*l.* given to her were entitled to; he, at the request of the Parties interested in such question, forbore to state his opinion thereon, and reported only who were the Persons entitled to aliquot parts of the same, and the proportions thereof to which they were respectively entitled.

The Question was, Whether such Legatees were entitled to have as much of the Three per cent. Stock, in Court, as would have been sufficient to answer the Annuity of 250*l.* given to the Widow; or whether they were only entitled to as much Stock as would now produce to the Sum of 5,000*l.*, being the Sum which, at legal Interest, would have been sufficient to answer the Annuity.

[Before the Case was argued, it was suggested by Mr. *Blake*, that the Question raised by the *Master's* Report, was between the particular Legatees and the residuary Legatees, who were both Plaintiffs in the Suit, and therefore that a Petition would be proper; but the *Vice-Chancellor* held, that a Petition was not the proper course, and that a Supplemental Bill must be filed; but said he would hear the Case, but that no directions should be drawn up until the Supplemental Bill was filed.]

Mr. *Blake*, for the residuary Legatees.

Mr. *Simpkinson*, for the other Legatees.

The VICE-CHANCELLOR:—

The Gift by the Will to the particular Legatees, is in effect a Gift of as much Stock to be purchased by the Property when converted, as would produce an Annuity of 250*l.* a year. The Executors did not convert the Property during the life of the Widow, but they paid her the Annuity so long as she lived. After the death of the Widow, they sold the Property and invested it in Stock, and it has been transferred into the Name of the *Accountant General* of this Court, in Trust in this Cause. The Court must now give to these Legatees as much Stock as would produce, by the Dividend, an annual Sum of 250*l.* If Stock had fallen instead of having risen, the particular Legatees must have borne the disadvantage.

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14th December.

JOHN VAUGHAN, who died in January 1804, by his Will, 30th of October 1786, (amongst other things) requested that his just Debts (not meaning those that might happen to be Liens on any part of his real Estate at the time of his decease), should be paid as soon as might be after his decease, out of his personal Estate, by his Executrix thereafter named, but since deceased; and he thereby, as far as in his power lay, ratified and confirmed the Settlement he had made, and the Jointure thereby settled on his Wife *Elizabeth Letitia Jane Vaughan* (since deceased); and he thereby gave and devised all his Freehold and Copyhold Estates, &c. in *England, Wales, and in the Island of Jamaica*, and all gage.

Testator exempts his Personal Estate from the payment of Mortgages on his Real Estate, which he devises to Lord C. subject to the Incumbrances. Held, that descended Estates were liable to discharge the Mort-

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other his real Estate whatsoever and wheresoever situate, subject to the Incumbrances which might affect the same at the time of his decease, and subject to the Annuities thereinafter given, which he charged on his said real Estate with the payment of, to certain Persons therein named, to the use of his the said *John Vaughan's* first and other Sons successively in Tail Male, with remainder to his first and other Daughters successively in Tail Male, with remainder to the said *Elizabeth Letitia Jane Vaughan* for her life, with remainder to the Right Honourable *John Lord Cawdor*, the Defendant; and after giving certain Annuities and Money Legacies to certain Persons therein named, he gave, devised, and bequeathed unto his said Wife, *E. L. Jane Vaughan*, all his Plate, Goods, Cattle, Chattels, Money and Securities for Money, and all Rents and arrears of Rent which should be due from his Tenants at the time of his decease; and all the rest, residue and remainder of his personal Estate and Effects whatsoever and wheresoever, and of what nature, kind or quality soever not therein by him before disposed of, as and for her own proper Goods, Estate and Effects for ever, subject to the payment only of such Debts as he should owe as should not be Liens on or secured upon any real Estate of his, it being his intention that no part of his personal Estate should go to exonerate his real Estate, but that the same should go to his said Wife, subject only to such Debts on his said real Estates, and to his said Legacies and Funeral Expences; and the said *John Vaughan*, by his said Will, appointed his said Wife sole Executrix thereof.

The personal Estate being given away, subject to the payment of all the Testator's Debts, (except such as

were Liens on the real Estate), and such part of the real Estate upon which there were Liens being devised to the Defendant, the question was, Whether the devised Estates must satisfy the Incumbrances upon them, or whether the descended Estate must discharge such Incumbrances ?

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Mr. Hart, Mr. Heald, and Mr. Roupell, for the Plaintiffs, the Co-Heirs at Law :—

It was the intention of the Testator that the devised Estates should satisfy the Mortgages upon them. Those Estates must be taken *cum onere*. He has expressly exempted the personal Estate from the payment of these Mortgages and certain Annuities given by the Will ; and having done so, and devised the Estates to the Defendant, expressly subject to the Mortgages or “ Liens,” as the Will terms them, on those Estates, the descended Estates cannot be called upon to satisfy such Mortgages. They cited *Donne v. Lewis* (a).

Mr. Bell, for the Defendants, was stopped by

The VICE-CHANCELLOR :—

The descended Estates must pay these Debts, unless the Testator has expressed a different intention in the Will.

The personal Estate is the primary Fund for the payment of these Debts, and the descended Estates the second. The Testator has expressly directed, that his personal Estate, the primary Fund, shall not be applied in payment of these Debts ; but he has no where said, that

(a) 2 Bro. C. C. 257.

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the descended Estates, the secondary fund, shall not be so applied. The Estates charged with the Mortgages are indeed devised, subject to the payment of the Incumbrances upon them; but a primary Fund is not exonerated merely because another Fund is provided. Such other Fund is considered as auxiliary only, unless the primary Fund be expressly exonerated. To exonerate the descended Estate, there must not only be a clear intention to subject the devised Estates to the payment of the Debts, but also a clear intention that the descended Estates should not be subject to the payment of the Debts; *Watson v. Brickwood* (*b*).

Demurrer allowed.

(*b*) 9 Ves. 447.

CURRE *v.* BOWYER.

15th December.

Creditor proceeding at Law against an Executor after notice of a Decree against him to account, is so far in the nature of a Contempt of Court, that upon an application

IN this Case, (and upon several other occasions) the Vice-Chancellor said, that if a Creditor proceeds at Law against an Executor, after notice of a Decree against the latter to account, He should consider it so far in the nature of a Contempt of the Court, that upon a Motion for an Injunction to restrain further Proceedings at Law, he would refuse the Creditor the Costs of the further Proceedings at Law, and the Costs

for an Injunction, the Court will refuse him the Costs of the further Proceedings at Law, and the Costs of the Application.

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The Reverend WILLIAM JOHNSTON, the Reverend JERVIS and EBENEZER JOHNSTON - Plaintiffs;
And,

MARY SWANN and FRANCIS POLLARD, and His Majesty's ATTORNEY-GENERAL - Defendants.

15th December.

SWANN DOWNER, of Aldermanbury, London, Gent. by his Will, 17th day of January 1811, after several devises and bequests, therein mentioned, and a bequest to the Plaintiffs, the Executors of his Will, of 300*l.* each, and also a Mourning Ring to each of them, of the value of three guineas, in consideration of the trouble they might have in the execution of his Will, and of the trusts thereby reposed in them, bequeathed as follows : " I direct my Executors, with all convenient speed, to lay out and invest the Sum of 7,100*l.* of lawful Money of Great Britain, part of my personal Estate, in Government Funds or Securities, in the names of the Minister for the time being of the parish of Brighthelmstone aforesaid, and such three other Inhabitants of the said parish as to my said Executors in their discretion shall appear to be substantial and respectable Persons, to hold the same as Trustees for the purposes herein-after mentioned ; and I direct that the said Minister and other Trustees do and shall, jointly and in concurrence with the Churchwardens and Overseers of the

*A Bequest of 7,100*l.* to be laid out in the Funds, and the Interest and Dividends to be applied in providing a proper School-house, held to be a good charitable Bequest, as a School-house might be hired. A Bequest of residue for the benefit of such public and private Charities as the Executors may think fit, and amongst others to establish a Life-boat at Brighthelmstone,*

held good; but that money on Mortgage and a Lease did not pass, as being void under the Statute, but that Fixtures in the house, which was on Lease formed part of the Residue and passed.

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said Parish for the time being, from time to time pay apply and dispose of the Interest and Dividends of such Funds or Securities in manner and for the purposes following, (that is to say); first, In paying the expenses of providing a proper School-house for the instructing of twenty poor Girls of the said parish in Needle-work, Reading and Writing; such expense of providing a School not to exceed the annual Interest and Dividends of so much or such part of the Stocks or Funds wherein the said 7,100*l.* shall be invested, as at the time of such investment shall be of the value of 600*l.* of lawful Money of *Great Britain*: and in the next place, in completely clothing the said twenty poor Girls twice in every year, each of such Girls to have two suits of Clothes at or upon their election or entrance on the foundation of the said School, in order that they may appear decent on the Sabbath Day; and each and every of such Girls to have a Cloak as often as the Managers and Trustees of the said Charity for the time being shall think fit, and a Bag to be provided to keep each of the said Girls best Clothes in:—And it is my will, that out of such Interest and Produce of the said Trust Funds, a Salary of 40*l.* a-year shall be paid and allowed, by quarterly payments, to a proper Mistress, who shall teach and instruct such twenty poor Girls in plain Needle-work and Reading:—And my will is, that such Mistress shall in the first instance, and afterwards from time to time as occasion may happen, be nominated and appointed by the Trustees of the said Fund, and the Churchwardens and Overseers of the said parish for the time being; and that such School-mistress shall devote her whole time to the business of the said School, and shall not on any account undertake the teaching of any other Children (except her own, in case she should have any),

or do or attend to any other Business than that of the Care and Instruction of the poor Children of the said School:—And I direct that the Trustees of the said Funds, and the Churchwardens and Overseers of the said Parish for the time being, shall be the Directors and Managers of the said School for ever:—And that in case of neglect of duty, misbehaviour, inability or other cause, such School-Mistress shall and may be removed by and at the pleasure of the said Directors and Managers of the said School; and that such Scholars shall from time to time, in case of neglect to attend the said School regularly, or other misbehaviour, be in like manner removable by the said Directors and Managers:—And it is my will that the Children of such poor industrious Persons of the said parish of *Brightelm-stone* as do not receive parish relief, are to be the first Objects of the said Charity; and that none be admitted into the said Charity whose Parents can afford to send them to other Schools; and that no such Child shall be admitted into the said School before the age of six, nor continued therein after the age of twelve years:—And I further direct that 10*l.* per annum, or such other annual Sum as the Trustees shall think reasonable and necessary, of the Interest and Produce of the said Trust Stocks or Funds, shall be applied for the purchase of Coals and Candles for the use of the said School:—And that the said Trustees do appropriate the annual Sum of 20*l.*, further part of the said Interest and Produce, by way of Salary, to some proper Person, to teach and instruct the said poor Girls in Writing, and the first four rules of Arithmetic; and the further annual Sum of 25*l.*, or so much thereof as shall be requisite, in providing Books, Pens, Ink and Paper, Slates and other things necessary for the use of the

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said School; the Books to be Spelling Books, Primers, Bibles and Testaments :—And I do hereby direct that when any and every of the said Girls are from time to time dismissed from the said School (and having behaved well during their time therein), they shall, at the discretion of the said Directors and Managers, have each of them a Bible given her out of the Charitable Fund :—And it is my will, and I direct that one or more of the elder Girls shall or may assist the Mistress in hearing the Scholars read, and in their Needle-work :—And I request that the Minister, and other Directors and Managers, will often visit the School, that care may be taken that the most rigid discipline and good order be maintained; and that the Mistress and Scholars, in their best Apparel, do attend Divine Worship every Sunday Morning :—And I further request that the Trustees may from time to time appoint four Ladies of the Town of *Brightelmstone* aforesaid, who are hereby authorised and requested benevolently to inspect the School, to see that good order and discipline is preserved; to consult with the Mistress, and examine the Scholars; and that two of them will call at the School once in a fortnight for that purpose, or oftener if they shall think proper :—And my will is, that 10*l.* per annum be paid by the Trustees to the said Ladies, for them to distribute in appropriate Toys to the youngest Children, and Books and other useful Articles for those who are further advanced, who shall distinguish themselves by general good behaviour, attention, diligence, progress in education, and punctual attendance at School, as it is my wish that they may be stimulated by rewards rather than punishment :—And my will is, that the said Minister, and other Directors and Managers, shall meet twice a-year, to examine Tradesmens Bills, and to audit

the Accounts, both with respect to the School and the Money appointed for the clothing of the poor Men and Women hereinafter mentioned ; and that on each of those days they shall dine out of the Income of the Fund :—And as to the rest, Residue and Remainder of such yearly Interest, Dividends and Produce of the said Trust Stocks or Funds, it is my will, and I do hereby declare and direct, that the same shall from time to time be paid and applied by the said Minister, and other Directors and Managers, for the further promotion of the objects of the said Charity, as they shall think necessary for the improvement thereof; provided nevertheless, and I do hereby declare it to be my will and intention, that in case the said Fund so to be purchased or raised with the said Sum of 7,100*l.*, and the Dividends, Interest and Increase thereof, shall be more than sufficient for the purposes aforesaid, then I do hereby declare that the number of Girls to be educated in manner aforesaid, may be increased, at the discretion of the said Directors and Managers for the time being; but in case the same should be found insufficient for the Education of twenty poor Girls in manner aforesaid, then that the number shall be proportionably decreased, at the like discretion, any thing herein contained to the contrary notwithstanding :—And I direct my Executors, with all convenient speed, to lay out and invest the Sum of 5,000*l.* of lawful Money of *Great Britain*, further part of my personal Estate, in Government Funds or Securities, in the names of the Minister of the said parish of *Brightelmstone*, and such other three Inhabitants of the said parish as to my said Executors in their discretion shall appear to be substantial and respectable Persons (such three Inhabitants to be either the same as shall be appointed by my Executors to the

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said first mentioned Trust, or other Persons, as my said Executors shall think fit), to hold the same as Trustees for the purposes hereinafter mentioned:—And I direct that the said Minister and other Trustees do and shall, jointly and in concurrence with the Churchwardens and Overseers of the said parish for the time being, from time to time pay, apply and dispose of the Interest and Dividends of such last mentioned Funds or Securities in, for, or towards the clothing of twenty-five poor Men, and the like number of poor Women of *Brightelmstone* aforesaid, yearly, on Christmas Day, for ever; such Clothing so to be given to each of such poor Men to be of the value of 5*l.* or thereabouts, and the Clothing so to be given to the Women to be of the value of 3*l.* or thereabouts, or the said Clothing both of the Men and Women to be of such other greater value as to the Minister, Churchwardens, Overseers and other Trustees shall seem necessary and proper; and in case the Interest and Produce of the said last mentioned Trust Fund shall be insufficient to clothe such poor Men and Women, then I do direct that a less number may be clothed; and in case such Interest and Produce should be more than sufficient for the purposes aforesaid, then I direct that a greater number of Men and Women may be clothed in manner aforesaid, at the discretion of the Minister, Churchwardens and Overseers of the said parish for the time being:—And my Will is, and I do hereby provide, declare and direct, that as often as any of the Trustees, in or to whose names the said Charitable Legacies hereinbefore bequeathed, may be invested or transferred, shall die, or cease to be resident at or near *Brightelmstone* aforesaid, or decline to act in the aforesaid Trusts thereof, the Survivors or others of the said Trustees,

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shall nominate other Trustee or Trustees thereof, from among the other substantial inhabitants of *Brightelmstone* aforesaid, in the room, place and stead of the Trustee or Trustees so dying or ceasing to reside at *Brightelmstone*, or desiring to be discharged as aforesaid, so and in such manner as that there may be always four respectable Trustees in whom the said Trust Funds shall be vested: it being always understood, that the Minister of the parish for the time being, whether resident or not, shall be one of such Trustees in whom the said Fund shall be vested, if he will accept the same:—And my will also is, that as often as any new Trustee or Trustees shall be appointed in manner aforesaid, the said Trust Funds and Premises shall be transferred in such sort and manner as that the same may be legally and effectually vested in the surviving or continuing Trustees, jointly with such new Trustee or Trustees thereof, upon the Trusts and for the Purposes hereinbefore declared, of the said Trust Funds and Premises, the Trustee or Trustees whereof shall so die or cease to reside at or near *Brightelmstone*, or decline to act in the said Trusts; and that every new Trustee or Trustees, shall or may act in such Trusts, in the same manner and as effectually as if he or they had been appointed a Trustee or Trustees thereof, by this my Will:—And I direct that in such Cases as may arise, wherein a difference of opinion shall be between the said Directors and Managers, either as to the persons so to be appointed, or in any other matter touching the execution of the Directions hereby given, and the Trusts in this my Will, in regard thereto, then, that the majority of voices shall prevail, and in case of equality of voices, that the Minister of the parish for the time being shall have the casting vote; and that it shall be

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competent for the said Directors and Managers from time to time to make such Rules and Orders for the further promoting the purposes of the said Charity, according to the intention hereby by me expressed, as to them shall seem necessary and fit:—And I do hereby further provide and declare, that the said Trustees, or any future Trustees to be appointed as aforesaid, shall not be answerable or accountable the one for the other or others of them, or for any more Monies than what shall come to his or their hands under the Trusts aforesaid; and that they shall and may deduct and reimburse themselves, and allow to their Co-trustees, all their Costs, Charges, Damages and Expenses, of or attending the performance of the Trusts reposed in them.” The Testator, after making several other Bequests, “gave and bequeathed all the Residue of his personal Estate and Effects unto Plaintiffs, and the Survivors and Survivor of them, and his Executors, Administrators, upon Trust, to pay and apply the same, within two years next after his decease, for the benefit of such public or private Charities, as they in their discretion might think fit; and amongst other things, to establish a Life-boat for the use of the Town of *Brighton*, if they should think fit to establish the same, but not otherwise;” and he appointed the Plaintiffs, Executors of his Will.

The Bill, stating the Will, further stated, that the Testator died and left the Defendant *Mary Swann* his Heir at Law, and she, and the Defendant *Pollard*, (and some other persons whom the Plaintiffs were unable to discover) his next of Kin. The Plaintiffs proved the Will.

The *Prayer* of the Bill, was for an account of the personal Estate and Effects of the Testator, and of his

Debts, Legacies, &c.; and that the Rights of the Parties might be ascertained; and that the Trusts of the Will might be carried into execution; and that all proper Directions might be given for the due application of the Funds agreeably to the Will of the Testator.

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The Defendant *Mary Swann*, by her *Answer*, submitted to the Court, whether the personal Estate and Effects of the Testator passed by his Will, to the several charitable purposes in the Bill mentioned; and she, and the Defendant *Pollard* also, by their *Answer*, claimed as next of Kin.

By the Decree in the Cause, 12th June 1818, Accounts were directed of the Testator's personal Estate, and of the Debts, &c. with the usual Directions, and a Direction was made, to inquire what was the nature of the several Legacies.

The Cause now came on upon further Directions, upon the *Master's Report*.

The *Solicitor-General*, on behalf of the *Attorney-General*; and Mr. *Hart*, on behalf of the Plaintiffs :—

The Charitable Bequests are good, except as to 1,000*l.* of the Residue, which being due on Mortgage, cannot pass, but goes to the next of Kin.

The establishment of a Life-boat at *Brightelmstone*, if judged expedient, is a charitable purpose, and as effectual as a Bequest for the improvement of the City of *Bath*, which was established as a Charity.

The Bequest also, of the sum of 7,100*l.*, for keeping

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a School, and providing for the payment of the Rent of such School, is good; though a bequest of Money to be applied for the purpose of acquiring an Interest in a School, or of Land to build a School, would be within the Statute: the Testator meant merely, that a place for the School should be *hired*, for only the Dividends are made applicable for providing of a proper School-house. That Lands may be hired for a charitable purpose was decided in *Gastril v. Baker*, which Case is cited in *Vaughan v. Farrer* (*a*).

Mr. Agar, and Mr. Parker, for the next of Kin:—

The direction in the Will, out of the Interest and Dividends to provide a proper School-house, must mean the purchase of Land on which to build a School-house, and is therefore a void Bequest under the *Mortmain Act*.

The Testator directs Trustees of the School, and that the Churchwardens and Overseers of the parish for the time being should be the Directors and Managers of the said School for ever; which indicates an intention that Land should be purchased for a School-house, and the acquisition of an Interest which might be perpetuated and established for ever. If the Testator had meant that Land should be hired for a School-house, he would have said so. If he had so directed, would that have been valid? Is it allowable to a Testator to order a Sum to be applied in the hiring of a House for a School, on a Lease for 999 years, or a longer term? Would not that be within the mischief intended to be remedied by the Statute?

(*a*) 2 Ves.

The VICE-CHANCELLOR:

With respect to the School, the single question is, whether, to execute the expressed purpose of the Testator, Land must be purchased for erecting a School. The Testator has directed only, that a proper School-house should be provided, which may be by hire; and it is some evidence of his intent that Land should not be bought, that the Trustees are only to apply the Dividends, and no part of the Principal, to the Expence of providing a School-house. It is said, he meant the Charity to continue for ever; but this intent may be executed, without necessity for the purchase of Land.

The Gift of the Residue is a valid charitable Donation; but the 1,000*l.*, part of the Residue due on Mortgage, does not pass, being a void Gift under the Statute. This goes to the next of Kin. So the Lease belonging to the Testator, which was sold for 20*l.*, goes, for the same reason, to the next of Kin. With respect to the Fixtures, it is admitted, that the Testator had a right to remove them; and being therefore mere personal Chattels, they form part of the Residue, and pass under the bequest of the Residue for the charitable purposes.

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JAMES BRACEY the Elder, and JAMES BRACEY the Younger and MARTHA BOWYER BRACEY, Infants, by the said JAMES BRACEY the Elder, their Father and next Friend, - - - Plaintiffs;

The Rev. PETER SANDIFORD, Clerk, THOMAS BOWYER, and MASTON BELSON, Defendants.

16th Dec.

After Decree, the Prochein Amy of Infant Plaintiffs dies; on Motion of Defendant, a reference to the Master directed, to appoint another Prochein Amy.

AFTER the Decree made in this Cause, the next Friend of the Infant Plaintiffs died.

A Motion was made by Mr. Horne, on the part of the Defendants, that the Plaintiffs might be ordered to name a new next Friend, and he cited *Lancaster v. Thornton* (a).

The VICE-CHANCELLOR:—

After a Decree, the Defendant has a right to move in prosecution of the Suit. Let it be referred to the Master to appoint a next Friend.

(a) Ambler, 398.

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GIBBINS v. HOWELL.

16th Dec.

THIS was a Creditor's Suit, and Mr. *Wingfield* moved, at the instance of the Receiver in the Cause, for a reference to the *Master*, to inquire whether it would be for the benefit of the Parties interested in the Suit, that the Receiver should let any and what part of the Estates and Premises on Lease, for any and what number of years, and upon what terms and conditions.

The Estates in question were settled on *A.* for life, with Remainder to *B.* an Infant.

Mr. M. West, contra :—

The VICE-CHANCELLOR :—

The object of the Motion is to enable the Receiver to make Leases which will bind the infant remainderman. I recollect no instance in which the Court has assumed such a jurisdiction.

Motion on behalf of a Receiver appointed under a Creditor's Bill, for a reference to the Master, to see if it would be for the benefit of all Parties that he should be enabled to grant Leases of the Estates. The Estates were settled on A. for Life, with Remainder to B. an Infant. Held, there could not be such a reference.

Motion refused.

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MATTHEWS v. DANA.

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*Motion after
Bill filed, and
before Answer,
for a reference
as to Title. The
Counsel for the
Defendant say-
ing there were
other matters in
question besides
the Title, the
Motion was
refused.*

THIS was a Bill by the Plaintiff, the Vendor of an Estate, for the specific performance of an Agreement of Purchase by the Defendant.

Mr. Shadwell now moved, before Answer, for a reference to the *Master* to see if a good Title could be made to the Premises in question, and at what time the Abstract or Abstracts of the Title to the Premises was or were delivered. He mentioned *Balmanno v. Lumley* (a) as an authority for the Motion.

Mr. M. West, contra :—

In *Bonner v. Johnston* (b), the *Lord Chancellor* says, that in *Balmanno v. Lumley*, he should have been reported to have said, “I would make the Order, provided it were admitted that there was no other question between the Parties.” In the present Case there are other objections besides that as to the Title, and therefore this Motion cannot be sustained.

The VICE-CHANCELLOR :—

If an Answer had been put in, by which it appeared that the objection as to Title was not the only objection insisted upon, I could not have directed a reference as to the Title, which can only be, where the question of Title being the sole matter in dispute between the Parties, the proceeding upon such a Reference will conclude the Cause. Here the application

(a) 1 Ves. & Bea. 224.

(b) 1 Meriv. 366.

is before Answer; and as the Defendant's Counsel tells me, there are other matters besides the question of Title to be considered, I cannot grant the Motion.

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Motion refused, with Costs.

PENFOLD v. STOVELD.

17th Dec.

AN Injunction was obtained on the filing of the Bill. An Answer was put in, so fully answering the Case made by the Bill, as to render it probable the Injunction would be dissolved on a Motion for that purpose. Mr. Tinney now moved, on behalf of the Plaintiff, for leave to amend his Bill without prejudice to the Injunction, stating the nature of the intended Amendments. He cited *Sharpe v. Ashton* (a).

Injunction obtained ex parte. The Answer was put in. A Motion was then made to amend the Bill without prejudice to the Injunction, and the proposed Amendments were stated, but the Motion was refused, with Costs.

Mr. Newland, contra :—

The VICE-CHANCELLOR :—

A Plaintiff obtains an *ex parte* Injunction. The Defendant puts in an Answer displacing the Plaintiff's Equity, and entitling him to dissolve the Injunction. The Plaintiff then asks leave to amend the Bill, and make a new Case to maintain the Injunction in the

(a) 3 Ves. and Bea. 345.

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meantime. But his Title to the Injunction is gone; and if upon a new Case, he can make a new Title, he may revive the Injunction. I must refuse the Motion, and with Costs.

BARRY v. CANE and Ux.

17th December.

Husband and Wife being Defendants to a Suit, and the Wife living separate from the Husband, he was allowed, on affidavit of the fact, and that he had no controul or influence over her, to put in a separate Answer, and an Order was made that he should not be liable to process if she neglected to put in an Answer.

MR. Beames moved that the Defendant *Robert Cane*, the Husband, might be at liberty to answer separately from his Wife, and that he might not be liable to process on account of his Wife's neglecting to answer the Bill, on an Affidavit made by him (*a*), that his Wife lived separate and apart from him, and that he had no controul or influence over her.

Mr. Simons, contra :—

The Husband has already put in a separate Answer.

The VICE-CHANCELLOR :—

As the Husband has already put in a separate Answer there is no necessity for that part of the Motion which relates to such Answer; but as to the latter part of the Motion, you may take the Order.

(*a*) The Motion was at first made on an Affidavit by the *Solicitor* of the Husband, to the same effect as the Husband's Affidavit; but *His Honor* said, the *Husband* himself must make the Affidavit, as the facts rested personally in his knowledge.

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Ex parte HARRIS in re BUCHANNAN and BENN.

17th Dec.

MR. *Pepys* stated, that a Petition in Bankruptcy had been presented, for an Order to vacate the Bargain and Sale and Inrolment, and also the Assignment, except as to any Sales or other Disposition that might have been made of the real and personal Estate, and that the Commissioners might assign the outstanding Property to two of the Assignees already chosen, jointly with the one who might be elected by the Creditors, in the room of one *Casey*, who had become a Bankrupt and absconded from the Country; and that an Order was made by the *Vice-Chancellor* according to the Prayer of the Petition, but that some difficulty had arisen at the Inrolment Office how the Order was to be carried into effect, so far as it directed the partial vacating of the Bargain and Sale and Inrolment. He also stated, that the two Orders made, under similar circumstances, one, in *Ex parte Lemon*, and the other, in *Ex parte Cook* (a), were never drawn up, and are now in Minutes, upon the face whereof the Names of the different Purchasers are stated. In the present Case, a real Estate, (all the real Estate belonging to the Bankrupts,) was sold to a Mr. *Ashley*, and the Purchase completed; and there being no other real Estate to sell under the Bankruptcy, his Application was to vary the former Order, by directing the Assignment only, to be vacated; and as the Creditors had at a general meeting for that purpose, chosen a new Assignee in the stead of *Casey*, it was

Quære—
The effect of vacating a Bargain and Sale in Bankruptcy, as to preceding Purchasers under the Commission.

(a) 13 Ves, 271. and see *Ex parte Bainbridge*, 6 Ves. 451.

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and another.*

desirable that the Order should bear date this day, and the Assignment be directed to be made by the Commissioners, to the two old Assignees, and the new Assignee.

Mr. Sugden, for *Ashley* the Purchaser :—

The VICE-CHANCELLOR :—

You may take the Order. My impression is, that the effect of vacating the Bargain and Sale is altogether retrospective, and that, when vacated, it leaves the Title of previous Purchasers untouched; but if it were necessary now to decide that question, I should wish, previously, to confer with the *Lord Chancellor*, in order that so important a point might be fully settled (b).

(b) In a subsequent Case *Ex parte Corry*, before the *Vice-Chancellor*, April 1819, he observed he had conferred with the *Lord Chancellor* on the subject, and they were both of opinion, the Bargain and Sale might be

vacated prospectively, so as not to affect antecedent Conveyances; but to remove all difficulty on the subject, it was intended to have a declaratory law to that effect.

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Contra
Sigel v Phelps
7 Sun 239.
Hake v Parker
2 Keen. 59.

SMYTH v. MYERS.

A FEME Covert, who had a separate Estate, was the Plaintiff in this Cause, and she named her Husband as next Friend.

Mr. *Farrer*, on behalf of the Plaintiff, moved to strike out the Husband's name as next Friend, and to make him a Co-plaintiff.

The VICE-CHANCELLOR :—

It is necessary that the Husband should be a substantive Party to the Suit, as the Wife's claim to separate Property is against the *jus mariti*. By joining the Wife as a Co-plaintiff, as proposed, he will admit the statement in the Bill, that it is the separate Property of the Wife, and this will answer all the purpose of making him a Defendant.(a).

Motion granted.

(a) *Vid. Ryan v. Anderson, ante p. 174.*

*This case is vacated. by Wm. v. Barke & Keen 59.
Husband must be a defendant —*

VESEY v. WILKS and REED.

17th December.

MR. BEAMES, on notice given to the Defendants moved for liberty to amend the Bill in this Case, amending the Office Copy of the Defendant *Robert Wilks*, and praying no further Answer from him, and on payment of Twenty Shillings Costs to the Defendant *William Reed*, and without prejudice to the Injunction already obtained against the Defendant *Robert Wilks*.

The Motion was supported by an Affidavit of the Plaintiff, *Francis Vesey*, Esq. stating, that in or about Hilary Term last, the Deponent filed his Bill against the above named Defendants, stating, that previously to, and down to the year 1808, Deponent employed considerable time and labour in taking written Notes of certain Cases from time to time decided in this

not granted, stating facts, which were a surprise on the Plaintiff, and which made the Amendments necessary.

After an Injunction granted against one of two Defendants, who afterwards put in their Answers, leave was given, on an application for that purpose, upon Affidavit, to amend the Bill, without prejudice to the Injunction; the Answer of the Defendant against whom the Injunction was

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honourable Court, and which Notes Deponent from time to time published, under the Title of "Reports of Cases argued and determined in the *High Court of Chancery*," and that Deponent, in or about the said year 1808, had actually completed and published 14 Volumes of such Reports; and that in or about the said years 1808 *and* 1809 Deponent continued the said Reports, and in the said years 1808 *and* 1809, published such continuation in four parts, under the Title of "Reports of Cases argued and determined in the High Court of Chancery, during the time of Lord Chancellor Eldon," such continued parts when collected constituting what has been termed and known by the name of Volume 15 of Deponent's Reports, and in the Title Page to the said Volume, the said Reports are stated to be those of Deponent:—And further stating, that upon the publication of the aforesaid 15th Volume of Deponent's Reports, Deponent sold and disposed of the first Edition thereof, consisting of 1,500 Copies, but Deponent reserved to himself the absolute and sole power and disposition over all future and other Editions thereof, and Deponent did not, beyond such first Edition, part with his Property in, and Interest over the said Volume 15, and the Copyright thereof, but on the contrary, the entire Copyright or literary Property in the said Volume 15 of Deponent's Reports, hath ever since been and now is vested in Deponent solely and exclusively:—That the Defendants combining together, did, without the previous or any other sanction, consent or knowledge of Deponent, sometime in or about the Month of *August* then last, reprint a second or other Edition of the said Volume 15th of Deponent's said Reports, consisting of many Copies; and that Defendant *Robert Wilks* had then, or lately had in his custody

the greatest part of such second Edition or Reprint, and at least 100 Copies thereof:—And that Defendants or one of them had disposed of the other part of such second Edition or Reprint:—And that they or one of them had received considerable Sums therefrom, but which they had wholly applied to their own use:—And that Defendants or one of them pretended that they or one of them had some right to reprint and publish the said Work, Vol. 15 of Deponent's Reports:—and Deponent charged by his Bill, that Defendant *Robert Wilks* had acknowledged by writing, and in conversation with Deponent and other persons, that he had printed such second Edition or Reprint without this Deponent's consent, knowledge or sanction, and that he had 100 Copies of the said Reprint Vol. 15 of Deponent's Reports in his possession, and that he was connected with the other Defendant, *William Reed*, in making such Reprint:—and further charging that Plaintiff had repeatedly requested the said Defendant *Robert Wilks* to deliver up all the Copies of such pirated Edition or Reprint of the said 15th Vol. but which Defendant *Robert Wilks* absolutely refused to do; and Deponent had then lately caused a Note in writing to be delivered to the Defendant *Robert Wilks*, to prevent his parting with the said Copies unless to Deponent:—and Deponent by his said Bill, prayed that Defendants might be decreed to account with Deponent for all the sums of Money produced by the Publication and Sale of the said second Edition or Reprint of the said Vol. 15 of Deponent's Reports, received by them or either of them, or by any other person, by their or either of their order, or for their or either of their use; and that the said Defendants should be directed to pay the same to Deponent:—And further

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praying, that Defendant *Robert Wilks* might be ordered to deliver up to Deponent, possession of all Copies of said second Edition or Reprint of the said 15th Vol. of Deponent's Reports, then in his custody or power; and that the said Defendant *Robert Wilks*, his Agents, Servants and Workmen, might in the mean time be restrained by the Injunction of this honourable Court, from publishing the said or any other Edition or Reprint of Vol. 15 of Deponent's said Reports, and from parting with, or selling or disposing of the same, or all or any of the Copies then in his possession, of the said second Edition or Reprint:—Deponent further saith, that by an Order bearing date the 27th day of *January* last, made by this honourable Court, upon the Affidavit of Deponent and Certificate of Bill filed, an Injunction was awarded to restrain the said Defendant *Robert Wilks*, his Agents, Servants and Workmen, from publishing the Edition in the Plaintiff's Bill mentioned, or any other Edition or Reprint of Vol. 15 of Deponent's Reports, therein also mentioned; and from parting with, selling or disposing of the same, or all or any of the Copies then in his possession, of the said second Edition or Reprint:—Deponent further saith, that in pursuance of the said Order of the Lord High Chancellor, His Majesty's Writ of Injunction, under the Great Seal of Great Britain, tested at Westminster the 29th day of *January*, in the 58th year of His Majesty's Reign, issued, directed to the said Defendant *Robert Wilks*, his Agents, Servants and Workmen, and each and every of them, strictly enjoining and restraining the said Defendant *Robert Wilks*, his Agents, Servants and Workmen, and each and every of them, under a Penalty of 2,000*l.*, to be levied upon his and their, and each and every of their Lands, Goods and Chattels, to the use

of His Majesty, from publishing the Edition in the said Bill mentioned, or any other Edition or Reprint of Vol. 15 of Deponent's Reports therein also mentioned, and from parting with, selling or disposing of the same, or all or any of the Copies then in the possession of the said Defendant *Robert Wilks*, of the said second Edition or Reprint:—Believes that a Copy of the said Writ of Injunction, under Seal as aforesaid, was on the 30th day of *January* last, duly served personally on the said Defendant *Robert Wilks*, and the said Writ of Injunction was shown to him at the time of such service:—And this Deponent further saith, that on or about the 18th day of *November* last, the Answer of the Defendant *Robert Wilks*, was filed to the Deponent's Bill, but no Motion hath been made by him the said *Robert Wilks*, to dissolve the said Injunction, which is now, as this Deponent believes, in full force and undischarged:—Deponent further saith, that the Answer of the said Defendant *William Reed*, to Deponent's said Bill, was filed on the seventh day of *April* last, by which said Answer the said last named Defendant alleged (amongst other things,) that in or about *July 1811*, his Dwelling House and Shop were destroyed by Fire, and that at that time he had in his Shop and Premises for Sale, a very considerable number of Copies of said 15th Vol. of Deponent's Reports, and in such Fire about 500 of such Copies were destroyed; and that in or about the same month, the said *William Reed* made known to Plaintiff the loss he the said *William Reed* had sustained by the destruction of the said 500 Copies; and that this Deponent thereupon granted him permission to reprint the like number of Copies:—Deponent further saith, he is advised that it will be necessary for him to amend his Bill, by introducing

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and putting in issue, facts to rebut and cut down the aforesaid Assertions in his the said Defendant *William Reed's* Answer, but not to strike out or alter any of the Allegations or Averments in Defendants present Bill contained :—Believes he never gave permission to the said *William Reed* to reprint 500 or any other number of Copies of the said 15th Vol. of Deponent's said Reports ; and the Defence set up by the said Defendant *William Reed*, is a surprise upon Deponent, and was not contemplated or foreseen by him, when Deponent gave instructions for the framing his Original Bill in this Cause :—Deponent further saith, that he requires no further Answer to his said Bill, from the said other Defendant, *Robert Wilks*, and the Amendments intended by this Deponent, have no relation whatsoever to the Injunction granted in this Cause.

The Vice-Chancellor made the Order, observing that, the proposed Amendment did not alter the Case as to the Defendant *Wilks*, against whom alone the Injunction had been granted.

1815.

Between The Reverend WILLIAM WRIGHT and
SARAH ELIZABETH BITHIA BREWER, his
Wife - - - - - Plaintiffs ;
And,

ELIZABETH PLUMPTRE, JOHN SHUTE DUNCAN, and PHILIP BURY DUNCAN - Defendants.

THE Bill stated, That prior to and at the time of the execution of the Indenture of Lease and Release, and Settlement after mentioned, *Mary Molyneux*, Widow, one of the Parties to the Settlement, was seized or entitled in Fee, as Heiress at Law of her Father *Thomas Brewer*, deceased, to the Manor of *Paulton*, alias *Palton*, in the County of *Somerset*, and divers Lands, Messuages, &c. in the Parish of *Midsomer Norton*, in the same County, and in certain other Parishes and Places near thereto : —That a Marriage being intended between *Mary Elizabeth Molyneux*, the younger Daughter of the said *Mary Molyneux*, with *Thomas Bury*, certain Indentures of Lease and Release, and Settlement, dated 8th and 9th August 1748, were executed between the said *Mary Molyneux* and *Mary Elizabeth Molyneux* of the first part, *Thos. Bury* of the 2d part, and *Sir John Chichester, Bart.* and *John Plumptre* of the 3d part, and *Sir Wm. Morice, Bart.* and the Reverend *Charles Plumptre, Clerk*, of the 4th part, whereby, after reciting the intended Marriage between *Thomas Bury* and *Mary Elizabeth Molyneux*, it was witnessed, that in consideration of a Settlement made, or intended to be made, by the said *Thomas*

18th December.
Demurrer for want of Equity overruled, the Plaintiff by his Bill claiming under a Settlement stated in the Bill, but which the Bill represented as incapable of being set forth with certainty, the same being in the Defendants possession.

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Bury, of certain real Estates belonging to him, the said *Mary Molyneux* did grant and confirm unto the said Sir *William Morice* and *Charles Plumptre*, their Heirs and Assigns, all the said Manor of *Paulton*, alias *Palton*, and divers Messuages, Farms, Lands, &c. therein described, and situate in the Parish of *Midsomer Norton*, in the County of *Somerset*, and in other Parishes or Places near thereto, with their Appurtenances, to hold unto the said Sir *William Morice* and *Charles Plumptre*, their Heirs and Assigns, to the use of the said *Mary Molyneux* and her Heirs, until the said intended Marriage; and from and after the solemnization thereof, as to one Moiety of the said Manor and Premises, to the use of the said *Thomas Bury* for his life, with remainder to the use of the said Sir *William Morice* and *Charles Plumptre*, and their Heirs, during the life of the said *Thomas Bury*, upon Trust, to preserve the Contingent Remainders thereinafter limited, with remainder to the use of the said *Mary Elizabeth Molyneux* for her life; and as to the other Moiety of the said Manor and Premises, to the use of the said Sir *John Chichester* and *John Plumptre*, their Executors, &c. for the term of 200 years, upon certain Trusts therein mentioned, which have been since satisfied, and subject thereto, to the use of the said *Thomas Bury* for his life; with remainder to the use of the said Sir *William Morice* and *Charles Plumptre*, and their Heirs, during the life of the said *Thomas Bury*, upon Trust, to preserve the Contingent Remainders thereinafter limited; with remainder to the use of the said *Mary Elizabeth Molyneux* for her life; with remainder, as to the whole of the said Manor and Premises, to the use of the said Sir *William Morice* and *Charles Plumptre*, their Execu-

tors, Administrators and Assigns, for a term of 500 years, upon certain Trusts thereinafter mentioned, for raising Portions for the younger Sons and Daughters of the said Marriage; with remainder to the use of the first and other Sons of said *Thomas Bury* and *Mary Elizabeth Molyneux*, severally and successively in Tail Male; with remainder to the uses of the Daughters of the said *Thomas Bury* by the said *Elizabeth Molyneux*, as Tenants in Common in Tail General, with Cross Remainders; with remainder, as to the Moiety of the said Manor and Premises so limited, to the said Trustees, for the term of 200 years as aforesaid, to the use of the said *Thomas Bury*, his Heirs and Assigns, for ever; and as to the other Moiety of the said Manor and Premises, to the use of *Diana Molyneux*, the other Daughter of the said *Mary Molyneux*, during her life, with remainder to the use of the said *Sir William Morice* and *Charles Plumptre*, and their Heirs, during the life of the said *Diana Molyneux*, upon Trust, to preserve Contingent Remainders; with remainder to the use of the first and other Sons of the body of the said *Diana Molyneux*, severally and successively in Tail Male; with remainder to the use of the Daughters of the said *Diana Molyneux*, as Tenants in Common in Tail, with Cross Remainders; with remainder to the use of all and every the nearest of Kin in equal degree to the said *Diana Molyneux*, at the time of her decease, without Issue, of the name of *Brewer*, share and share alike as Tenants in Common, and not as joint Tenants, and their Heirs and Assigns for ever; and the Trusts of the said terms of 500 years were declared to be for the raising some sum of Money for the Daughters and younger Sons of the said Marriage; and in the said Indenture of Release and Settlement, was contained a proviso for determining the term of 500

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years, when the Trusts thereof should be satisfied or become unnecessary, "but the said Indenture of Lease and Release and Settlement being in the possession or power of the Defendants hereto, Plaintiffs are unable to set forth the same with certainty":—That soon after the date and execution of the said Indentures of Settlement, a Marriage was had between the said *Thomas Bury* and *Mary Elizabeth Molyneur*; and upon the said Marriage, said *Thomas Bury* entered in possession or receipt of the Rents and Profits of the said Manor and Premises as Tenant for Life thereof, under a Settlement, and continued in such Possession or Receipt until the time of his death in 1802; and he the said *Thomas Bury* in life-time made his Will, and thereby gave and devised unto the said *Diana Molyneur*, and her Heirs, all his Messuages, Lands, Tenements, and Hereditaments whatsoever:—That the said *Mary Elizabeth*, the Wife of the said *Thomas Bury*, died several years ago, in the life-time of her Husband, leaving no Issue of the said Marriage; or that if she left any such Issue, the same failed in the life-time of the said *Thomas Bury*; and upon the decease of the said *Thomas Bury*, the said *Diana Molyneur*, by virtue of the Limitations contained in the said Indenture of Release and Settlement, entered into possession or receipt of the Rents and Profits of one Moiety of the said Manor and Premises, as Tenant for Life; and she, by virtue of the Will of the said *Thomas Bury*, entered into possession or receipt of the Rents and Profits of the other Moiety of the said Manor and Premises, and continued in such possession or receipt until the time of her death, in February 1805:—That the said *Diana Molyneur*, by a Codicil to her Will, devised all her Estate and Interest in the Estates which were theretofore the

Estates of her Grandfather, *Thomas Brewer*, deceased (meaning the said Manor and Premises comprised in the said Indentures of Lease and Release, and Settlement), unto *Elizabeth Plumptre*, *John Shute Duncan*, and *Philip Bury Duncan* (the Defendants), their Heirs and Assigns:—That the said *Diana Molyneux* died unmarried, and upon her decease, the said *Elizabeth Plumptre*, *John Shute Duncan*, and *Philip Bury Duncan*, possessed, themselves of the said Indentures of Lease and Release, and Settlement, and they entered into the possession, or into the receipt of the Rents and Profits, not only of the said Moiety of the said Manor and Premises to which the said *Diana Molyneux* was entitled by virtue of the Will of *Thomas Bury*, but also of the other Moiety thereof, and which by the Indenture of Release and Settlement was limited, upon the death and failure of Issue of the said *Diana Molyneux*, to the nearest of Kin to *Diana Molyneux*, at the time of her decease, without Issue, of the name of *Brewer*:—That at the time of the death of the said *Diana Molyneux*, Plaintiff *Sarah Elizabeth Bithia Brewer Wright* was the nearest of Kin to the said *Diana Molyneux*, of the Name or Family of *Brewer*; (that is to say) the said Plaintiff was the Daughter of the Reverend *John Brewer*, Clerk, deceased, who was the only Son of *Nathaniel Brewer*, deceased, who was a Brother of the aforesaid *Thomas Brewer*, deceased, who was the natural Grandfather of the said *Diana Molyneux*, and the Father of the said *Mary Molyneux*, the Settlor, so that said Plaintiff stood in the Relationship of third Cousin to the said *Diana Molyneux*; and by reason of said Plaintiff being such nearest of Kin to the said *Diana Molyneux* as aforesaid, Plaintiff, in right of Plaintiff *Sarah E. Bithia Brewer Wright*, became entitled, upon the death

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of the said *Diana Molyneux*, and by virtue of the Limitation contained in said Indenture of Release and Settlement, to one Moiety of the said Manor and Premises :—That they have lately commenced an Action of Ejectment against the said *Elizabeth Plumptre, John Shute Duncan, and Philip Bury Duncan*, to recover the Possession of the said Moiety of the said Manor and Premises to which Plaintiffs are so entitled as aforesaid; but the said Indentures of Lease and Release, and Settlement, being in the Possession or Power of the said Defendants, Plaintiffs are unable safely to go to Trial in the said Action without a discovery of the contents thereof.

The *Prayer* of the Bill was, That the Defendants might make a full and true disclosure and discovery of all and singular the Matters and Things aforesaid, in order that the Plaintiffs might give the same in Evidence at the Trial of the Action of Ejectment; and that the Indentures of Lease and Release, and Settlement, of the 8th and 9th of August 1748, might be brought into Court, and deposited with one of the *Masters* thereof; and that Plaintiffs might be at liberty to use, and give in Evidence the same, at the Trial of the Action, in support thereof.

To this Bill, the Defendants demurred; and for cause of Demurral, showed, “ That the said Complainants have not by their said Bill made such a Case as entitles them to any Discovery touching the Matters contained in the said Bill, or of any such Matters, or to the Production thereby sought to be obtained; and that such Discovery and Production are wholly immaterial to the said Complainants, and can be of no avail

for the purposes for which the same are sought in and by the said Bill; wherefore, &c."

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Mr. Horne, in support of the Demurrer:—

Under the Settlement of the 8th and 9th August 1748, the Estate in question, in certain Events, which have happened, is limited "to all and every the nearest of Kin in equal degree to *Diana Molyneux*, at the time of her Decease without Issue, *of the name of Brewer*, share and share alike, as Tenants in Common." The Question is, whether the Plaintiff, *Sarah Elizabetha Bithia Brewer Wright*, who was one of the next of Kin, is entitled, she having married before the death of *Diana Molyneux*, and, consequently, lost the name of *Brewer*?

It is expressly required by the Settlement, that the next of Kin to take, must be of the name of *Brewer*; and changing that Name by her Marriage before the death of *Diana Molyneux*, she has no Claim.

In *Bon v. Smith* (*a*), a Man had Issue a Son and a Daughter, and devised his Land to his Son in Tail, and if he died without Issue, that it should remain to the next of his Name, and died. The Son died without Issue, the Daughter being then married, and the Question was, whether she should have the Land, and it was held she should not, for she had lost her Name by her Marriage, but that it should go to the next Heir Male of the Name. But if she had not been married at the time of her Brother's death, the Daughter should have had it, for she was next of the Name (*b*). So in *Job-*

(*a*) Cro. Eliz. 532.(*b*) 1 Ves. 335.

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son's Case (*c*) ; *Jobson* devised Land in Tail, the Remainder to the next of his Kin of his Name ; and at the time of the Devise, the next of his Kin was his Brother's Daughter, who was then married to *J. S.* The Devisor died. The Tenant in Tail died afterwards without Issue. Whether this Daughter should have the Land, was the Question upon a special Verdict, and it was adjudged without argument that she should not, "for she is not now of the Name of the Devisor, but of her Husband's Name ; but if she had been unmarried at the time of the Devise and death of the Donor, although she had been married at the time of the death of the Tenant in Tail without Issue, yet she should have had the Land."

It is true, that in *Pyot v. Pyot* (*d*), Lord *Hardwicke* seems, according to *Vezey's Report*, to have decided in opposition to these Cases, but the Mistake in the Report is corrected by Baron *Thompson*, in *Leigh v. Leigh* (*e*), where he assisted the *Lord Chancellor*, he having examined the *Registrar's Book*, and found, that the Devise was not, as stated in *Vezey*, "to the nearest Relation of the Name of *Pyot*," but "to the nearest Relation of the Name of the *Pyots*." There it was right to consider the Words as meaning, "of the Stock of the *Pyots*." As the Plaintiff has shown no Title to recover at Law, she is not entitled to a Discovery, and the Demurrer is well founded.

The *Solicitor-General*, and Mr. *Bell*, *contra* :—
The Question is, whether the Plaintiff has stated in

(*c*) *Cro. Eliz.* 532.

moved the Opinion of the

(*d*) This Case is introduced

Court in this Case."

thus, " *Glanville, Serjeant,*

(*e*) 15 *Ves.* 99, 110, 111.

her Bill a Title to recover at Law, and, consequently, to a Discovery. It is admitted she is nearest of Kin, and that her Name was *Brewer*. Does her Marriage, then, before the Death of *Diana Molyneux*, exclude her from claiming this Estate? In *Bon v. Smith*, there was not a Decision, but only an *obiter* Opinion, as observed by Lord *Hardwicke* in *Pyot v. Pyot*. *Jobson's Case* is a Decision; but there the Daughter was married when the Testator made his Will, which rendered it probable that she was not intended to take, as the Testator must have known she was not of his Name. What is said, if she had been unmarried at the time of the Will, and when the Testator died, was an *obiter* Opinion, not called for by the Case.

In *Pyot v. Pyot*, the Devise was, "to the nearest Relation of the Name of the *Pyots*;" and that was held to mean, of the Stock of the *Pyots*. What difference is there between "of the Name of *Pyot*," and "of the Name of the *Pyots*." There it was held, the change of Name, by Marriage, did not prevent the Claim; and that Case is an authority to show, that the Marriage in this Case does not disappoint the Plaintiff of the Gift, it being sufficient that she is of the Stock of the *Brewers*. If *Jobson's Case* is contrary to *Pyot v. Pyot*, and *Leigh v. Leigh*, it must be considered as overruled. The Testator does not appear very anxious about his Name, there being a Limitation to the Sons and Daughters of *Diana Molyneux*, without requiring them to take his Name.

There is another Objection to this Demurrer. The Question is not ripe for a Decision; for the Bill states the existence of the Settlement, and that it is in the

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possession of the Defendants; it then states what the Terms of the Settlement are supposed to be; but that they cannot with certainty be set forth, for want of the Deed. The Court will not, therefore, decide in the dark, as to the effect of the Settlement, when it is not certain what the Terms of it are.

The VICE-CHANCELLOR:—

The last objection is fatal to the Demurrer. The Demurrer in effect insists, that if the Settlement is according to the statement of the Plaintiffs, they take no Title under it; but the Court cannot conclude the Plaintiffs by that statement, for they admit that it may be inaccurate, and allege that the Settlement being in the possession of the Defendants, they are unable to set it forth with certainty. If the Defendants mean that the Court should at once be called upon to determine the true construction of the Settlement, they must, from the frame of this Bill, be put to plead it.

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**Lord Viscount MILSINGTON and others, v. Earl
MULGRAVE and others.**

18th Dec.

BY an Indenture of Settlement, 25th May 1793, certain Leasehold Estates, held of the *Deans and Canons of Windsor*, were settled on the *Earl of Portmore* for Life, then to the Plaintiff *Lord Viscount Milsington* for Life, and then absolutely to the Plaintiff, *Brownlow Charles Colyear*; and in the Deed it was provided, "that it should be lawful for the Trustees from time to time as occasion should require, and as they should think proper, during the continuance of the Trusts therein declared, respecting the Leasehold Premises, to apply for Renewal, and to do their or his endeavours to renew the several Leases or Grants of the Premises, and to defray the Fines, Costs and Charges for and attending all such Renewals by and out of the Rents, Issues and Profits of the same Premises, or by Mortgage thereof; and that all new Leases or Grants thereafter to be obtained of the same Premises, should be and be declared on such and the same Trusts, &c. as were declared of the then subsisting Leases." New Leases of the Premises for twenty-one years were granted by the *Dean and Canons* to the Trustees for twenty-one years, on the 28th June 1802; and the Bill stated, that it had been the custom of the *Deans and Canons* upon the expiration of the first seven years of such Terms, upon application of the proper Parties and surrender of the existing Leases, and payment of proper Fines and Charges for the purpose, to grant new Leases for fresh Terms of twenty-one years, commencing

On Demurrer, Held, that Trustees to whom a discretionary Power was given of renewing Leases, had not an arbitrary Power of Renewal, but must renew when most for the benefit of the Cestui que Trust.

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from the date of the surrender of the former Leases. The Bill further stated, there had been no Renewals of the Leases since the 28th June 1802 ; and that the Plaintiffs had requested the Defendants, the Trustees, to renew, which they refused to do. The *Prayer* of the Bill was, that the Defendants, the Trustees, might be directed forthwith to procure Renewals of the Leases in pursuance of the Trusts of the Settlement ; and that they might be directed to pay the Fines and Costs of such Renewals ; and that the Defendants, *Smith, Henry Dawkins and John Dawkins*, the present Representatives of *Henry Dawkins*, a deceased Trustee, might also be directed to pay such Fines and Costs.

To this Bill the Defendants put in general Demurrs.

The *Solicitor General*, Mr. *Roupell*, Mr. *Skirrow*, and Mr. *Rolfe*, in support of the Demurrs :—

The Trustees had a discretionary Power to renew at any time during the term of twenty-one years ; and this Court will not interfere with that discretion. The Fines and the Expenses of the Renewals are to be paid out of the Rents and Profits of the Estates. *Lord Portmore*, the Tenant for Life, has an advantage by delaying the Renewal as long as possible, and it was probably intended by the Settlement that he should have that advantage if the Trustees thought proper. The Trustees cannot be liable to pay the Costs and Expenses of the Renewal, by acting according to the discretionary Power given by the Settlement. There are still six years of the Lease to come ; and though the Court should think they ought now to renew, it will not consider them as blameable for not renewing before. The Representatives

of *Dawkins* cannot be liable, because when he died there were twelve years of the Lease unexpired.

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The VICE-CHANCELLOR [without hearing the Defendant's Counsel] :—

I cannot allow these Demurrsers, without holding that the Trustees have an arbitrary and capricious power, with respect to the renewal of this Lease, and are not to be required to give any explanation, why the Lease has not hitherto been renewed. Such an arbitrary and capricious power may be given to Trustees, but it is not conferred by this Settlement, where the Trustees are to renew as occasion may require, and as they may think proper; by which is to be understood, as they may think proper for the interests of their *cestui que Trust*. The exercise of a power of renewal, does, indeed, require a discretion, for otherwise a Trustee would be bound to comply with any unreasonable demands on the part of the Lessor; but not an arbitrary and capricious discretion.

Demurrer overruled.

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ANONYMOUS.

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*On opening
Biddings, 10 per
cent. to be
deposited.*

AN application was made to open Biddings; and a question arose what Deposit ought to be made: The Vice-Chancellor observed, there was no fixed Rule as to what amount the Deposit should be; but that, as in ordinary Sales by Auction, 10 per cent. was the usual Deposit, he thought it would be an useful Rule, that the same Deposit should be made when Biddings were opened; and he made an Order accordingly (a).

(a) In Gibbons v. Howell, ordered by the Vice-Chancellor 29th Jan. 1819, and in several other Cases, 10 per cent. was

Same day.

*The Master,
on a Reference,
making use of
Affidavits instead
of Interroga-
tories, he was
directed not to
proceed on the
Affidavits; with
liberty, under the
circumstances,
to apply to the Court, if, by death or otherwise, it became impossible to obtain, under a Commission, the evidence of the Persons who had made the Affidavits.*

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the *Master* not to proceed upon the Affidavits, with liberty, under the circumstances, to apply to the Court, if by death or otherwise it became impossible to obtain, under a commission, the Evidence of the Persons who had made the Affidavits.

One argument used in support of the Motion was, that the Solicitor who was said to have concurred in the use of Affidavits, was concerned for Infants, and that his concurrence could not bind them; but as to this, His *Honor* observed that, generally speaking, Infants were bound as much as Adults were, by the conduct of their Solicitor.

Mr. Horne, and Mr. Pemberton, in support of the Motion.

Mr. Agar, Mr. Bell, and Mr. Parker, contra.

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Infants are bound by the conduct of their Solicitor, in a Cause.

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A MOTION was made, on a Bill for a specific Performance of an Agreement to purchase, for an Order of Reference as to the Title, and whether a Title was shown prior to the filing of the Bill. It was objected that the latter part of the Motion would be more properly made the subject of further directions after the Report upon the Title.

A Motion may be made on a Bill for a specific Performance, for a Reference as to the Title, and whether a Title was shown prior to the filing of the Bill.

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The VICE-CHANCELLOR:—

It is very true that in strictness it may be said not to be regular, to make it part of the Order, to inquire when a good Title was shown, because if the *Master* be of opinion that no good Title was ever shown, that part of the Order is nugatory. But as the addition of those few words in the Order of Reference will, in case the *Master* finds a good Title can be made, save the delay and expence of a further Order and a further Report, it is clearly for the interest of both Parties, that those words should be introduced

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23d Dec.

Exceptions do not lie to a Master's Report of Costs, nor can there be a re-taxation in respect of mere quantum; but on a special Case made by Petition, either of irregularity in the Proceedings, or that the Master, in his Taxation, acted upon a mistaken principle, the Court will interfere.

THIS was a Petition on the part of the Plaintiff, praying liberty to file Exceptions to a *Master's Report* of his Taxation of a Solicitor's Bill, and stating *Items* in the Bill which, as it was conceived, the *Master* had improperly allowed.

The Solicitor's Bill, as taxed, amounted to upwards of 500*l.*, the objectionable *Items* amounted to 20*l.*

Mr. Hart, and Mr. Beames, in support of the Petition, observed, that the Plaintiff, according to several Master, in his Taxation, acted upon a mistaken principle, the Court will interfere.

Authorities (*a*), could not take Exceptions without leave of the Court upon Petition; and they endeavoured to show that the *Items* mentioned in the Petition were improperly allowed.

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Mr. Dowdeswell, *contra*, insisted the *Items* in question had been properly allowed by the *Master*.

The VICE-CHANCELLOR:—

Generally speaking, the *Master's Report* is final as to Costs, and Exceptions do not lie to it, for the *Master* is much more competent than the Court, to determine the proper amount of charges. But although there can be no re-taxation of a Bill in respect of mere *quantum* (*b*), yet upon a special Case made by Petition, either of irregularity in the proceedings, or that the *Master* has acted upon a mistaken principle, the Court will interfere. In the present Case, I think the *Master* right, and the Petition must be dismissed with Costs.

- (*a*) Holbeck *v.* Sylvester, 6 Ves. 417; Hunt *v.* Fownes, 9 Ves. 70; Lucas *v.* Temple, 1b. 290; Turner's Pract. 4th ed. 654; and see Pitt *v.* Mack-
- reth, 3 Bro. C. C. 321, and what is said in Purcell *v.* Macnamara, 12 Ves. 170.
- (*b*) Wyatt's Pract. Reg. 145.

1818.

Between His Majesty's ATTORNEY-GENERAL, at
the Relation of the Honourable GEORGE SPENCER
CHURCHILL (commonly called the Marquis of
Blandford), and the Honourable GEORGE JAMES
WELBORE ELLIS AGAR - Informant and Plaintiff;

And,

The Most Noble GEORGE Duke of }
MARLBOROUGH - - - } - Defendant.
18th, 19th, 21st,
24th Dec.

Held, on Demurrer, that the Duke of Marlborough, for the time being, is, under the Act of the 5th Anne, c. 3, bound to maintain Blenheim House, and is not therefore at liberty to cut Trees, which are essential to its ornament or shelter.

A Tenant in Tail restrained by Statute from barring Issue and those in remainder, is not, for that reason, within the principle of equitable Waste.

THE Information and Bill stated, that by an Act passed in the 3d and 4th years of the Reign of Queen Anne, intituled, "An Act for the better enabling her Majesty to grant the Honor and Manor of Woodstock, with the Hundred of Wootton, to the Duke of Marlborough and his Heirs, in consideration of the eminent Services by him performed to her Majesty and the Publick;" after shortly stating various Exploits, Victories and public Services achieved and performed by the said John Duke of Marlborough, and particularly the glorious Victory of Blenheim; and after stating, that forasmuch as the happy Achievements of the said Duke having apparently tended, not only to the honour and safety of her Majesty and her Subjects, and of their Posterity, but also towards the future tranquillity of Europe, the Commons of England, in Parliament assembled, thought themselves obliged, in an humble Address to her Majesty, not only to express their great sense of the said glorious Victories, but also humbly to desire her Majesty that she would be graciously pleased to consider of some proper means to perpetuate the

memory of such signal Services; and her Majesty having been thereupon pleased to signify her intention to grant the interest of the Crown in the Honor and Manor of *Woodstock*; and the Hundred of *Wootton*, to the said Duke and his Heirs; and after noticing, that the Commons of *England*, in Parliament assembled, duly considering the good and prudent Provision made by her said late Majesty by the Act of Parliament therein mentioned, and believing that the Settlement of the said Honor, Manor and Hundred upon the said Duke and his Heirs, could make no precedent where there was or should be less merit, did beseech that it might be enacted, and it was enacted, that it should and might be lawful for the Queen's Majesty, by say Letters Patent under the Great Seal of *England* thereafter to be made, to give and grant unto the said *John Duke of Marlborough*, and his Heirs and Assigns for ever, or to any other Person or Persons to the use of or in trust for the said Duke, his Heirs and Assigns for ever, all that the said Honor and Manor of *Woodstock*, with the Rights, Members and Appurtenances thereof, situate, lying and being in the County of *Oxford*, and the Hundred of *Wootton*, and the Rights, Members and Appurtenances thereunto, in the said County, and also certain Manors and Advowsons therein mentioned; and also the demolished Messuage, Court House or Toft, with the Appurtenances, together with the Site thereof, then formerly called *Woodstock Manor House*, situate in the said County, within the Park therein and hereinafter mentioned; and also the piece or parcel of Ground, with the Appurtenances, commonly called or known by the name of *Woodstock Park*, lying and being in the said County, abutting as therein mentioned, containing in the whole, by estimation,

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1,793 A. 2 R. more or less, together with divers other Lands, Tenements and Hereditaments therein particularly mentioned and described; and all her said Majesty's Timber and Trees, Wood and Underwood, situate, standing, growing or being, or thereafter to stand or grow within, amongst other Lands of the said Park, called *Woodstock*; To hold the same unto the said *John Duke of Marlborough*, or such Person or Persons as he should nominate as aforesaid, his Heirs and Assigns, for ever; to the only use and behoof of or in trust for the said Duke, his Heirs and Assigns, for ever; to be holden in such manner, and by such honorary Service, as in the said Act is mentioned and set forth:—That in pursuance of the said Act, by Letters Patent under the Great Seal of *England*, bearing date the 5th day of May in the 4th year of the Reign of her said late Majesty, her said Majesty was pleased to grant all the said Honor and Manor of *Woodstock* and the Hundred of *Wootton*, and the said Park of *Woodstock*, with the House then erecting therein, and other the Manors, Messuages, Lands, Tenements and Hereditaments in the said Act of Parliament mentioned and described, to the said *John Duke of Marlborough*, his Heirs and Assigns, for ever:—That by another Act of Parliament made and passed in the 5th year of her said late Majesty (a), intituled, “An Act for the settling of the Honours and Dignities of *John Duke of Marlborough* upon his Posterity, and annexing the Honor and Manor of *Woodstock* and House of *Blenheim* to go along with the said Honours”; after reciting, that the Lords Spiritual and Temporal, in Parliament assembled, having with much satisfaction con-

(a) 5 Anne, c. 3.

sidered the many great Actions which *John Duke of Marlborough* had performed in her Majesty's Service, to the honour of his Country, and for the good of the common cause of *Europe*, such Actions as the wisest and greatest People had rewarded with Statues and Triumphs; and being extremely desirous to express the just sense they had of his Merit in a peculiar and distinguishing manner, and in order to perpetuate the Memory thereof, that his Titles and Honours, with his right of Precedence, might be settled and continued in his Posterity by Act of Parliament, as the method most effectual for that purpose, and best suiting so great an occasion, yet having always a just regard for the prerogatives of the Crown, her Majesty being the sole fountain of honour, thought it their duty, in the first place, by their humble Address, to have recourse to her Majesty for her royal Allowance before an Order given for bringing in a Bill of such nature; and by their said Address did humbly desire her Majesty would be graciously pleased to let them know in what manner it would be most acceptable to her Majesty the said Titles and Honours should be limited; in consideration whereto, her Majesty had been pleased most graciously to declare, that nothing could be more acceptable to her than the said Address, and that she was entirely satisfied with the Services of the Duke of *Marlborough*, and therefore could not but be pleased they had so just a sense of them; and did thereby declare her royal intention to be, that after the determination of the Estate of which the Duke of *Marlborough* then had in his Titles and Honours, the same should be limited in such manner as hereinafter declared and enacted; and her Majesty was pleased, in her most gracious Answer to the said Address, further to de-

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clare, that she thought it would be proper that the Honor and Manor of *Woodstock*, and the House of *Blenheim*, should go along with the Titles, and did therefore recommend that matter to their consideration; and the Duke of *Marlborough* therefore declaring, that he had made it his humble request to her Majesty, and did then desire that the Manor and Park of *Woodstock*, and the House of *Blenheim*, after the decease of the Duchess of *Marlborough*, should go along and be enjoyed with the Titles; and reciting, the said *John Duke of Marlborough* was, by several Letters Patent, created Baron *Churchill* of *Sandridge*, and Earl of *Marlborough*, to him and the Heirs Male of his Body; and by Letters Patent, bearing date the 14th December in the 1st year of her then Majesty's Reign, was created Marquis of *Blandford*, and Duke of *Marlborough*, to him and the Heirs Males of his Body; therefore, for perpetuating the Memory of the several great Actions performed by the said Duke, and for settling and continuing the said Titles and Honours aforesaid, and the right of Precedence in his Posterity, it was, amongst divers other things therein contained, enacted, that in default of Heirs Male of the Body of the said Duke of *Marlborough* issuing, the Titles, Degrees, Styles, Dignities and Honours aforesaid, should continue, remain, be invested in, and should be held and enjoyed by the Lady *Harriet*, eldest Daughter of the said Duke of *Marlborough*, and Wife of *Francis Godolphin*, Esquire, the Son and Heir Apparent of *Sydney Lord Godolphin*, the then Lord High Treasurer of *England*, and the Heirs Male of her Body begotten; and for default of such Issue, should continue, remain, be invested in, and held and enjoyed by *Anne Countess of Sunderland*, second Daughter of the said Duke of *Marlborough*, and Wife

of *Charles Earl of Sunderland*, and the Heirs Males of her Body begotten ; and for default of such Issue, should continue, remain, be vested in, and held and enjoyed by *Elizabeth Countess of Bridgewater*, third Daughter of the said Duke of *Marlborough*, and Wife of *Scroope Earl of Bridgewater*, and the Heirs Male of her Body begotten ; and for default of such Issue, should continue, remain, be vested in, and held and enjoyed by the Lady *Mary*, youngest Daughter of the said Duke of *Marlborough*, and the Wife of *John Montague*, Esq. called Marquis of *Monthermer*, Son and Heir Apparent of *Ralph Duke of Montague*, and the Heirs Male of her Body begotten ; and for default of such Issue, then to remain, continue, and be vested in, and held and enjoyed by all and every other the Daughter and Daughters of the said Duke of *Marlborough* to be begotten, severally and successively as they should be, one after the other, as they should be in priority of birth, and the Heirs Male of their respective Bodies issuing, the elder of such Daughters and the Heirs Males of her Body to be preferred and take before the younger of such Daughters and the Heirs Males of her Body ; and for default of such Issue, then to remain, continue, and be vested in, and held and enjoyed by the first Daughter of the Body of the said Lady *Harriet Godolphin* begotten, and the Heirs Males of the Body of such first Daughter begotten ; and in default of such Issue, then to continue, remain, and be vested in, and held and enjoyed by all and every other the Daughter and Daughters of the Body of the said Lady *Harriet Godolphin*, severally and successively, one after the other, and as they should be in priority of birth, and the Heirs Males of their respective Bodies issuing, the elder of such Daughters and the Heirs Males of her

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Body to be preferred and take before the younger of such Daughters and the Heirs Male of her Body ; and for default of Issue, then to continue, remain and be vested, and held and enjoyed by the first Daughter of the said *Ann Countess of Sunderland* begotten, and the Heirs Males of the Body of such first Daughter begotten ; and for want of such Issue, then to remain, continue, and be vested in, and held and enjoyed by all and every other the Daughter and Daughters of the Body of the said *Ann Countess of Sunderland* begotten; severally and successively, one after the other, as they should be in priority of birth, and the Heirs Males of their respective Bodies issuing, the elder of such Daughters and the Heirs Males of her Body to be preferred and take before the younger of such Daughters and the Heirs Males of her Body ; and for default of such Issue, then to continue, remain, be vested in, and held and enjoyed by the first Daughter of the Body of the said *Elizabeth Countess of Bridgewater* begotten, and the Heirs Male of the Body of such first Daughter begotten ; and for want of such Issue, then to continue, remain, be vested in, and held and enjoyed by all and every other the Daughters and Daughter of the Body of the said *Elizabeth Countess of Bridgewater* begotten, severally and successively, one after the other, as they should be in priority of birth, and the Heirs Males of their respective Bodies issuing, the elder of such Daughters and the Heirs Males of her Body to be preferred before the younger of such Daughters and the Heirs Males of her Body ; and for default of such Issue, then to continue, remain, be vested in, held and enjoyed by the first Daughter of the Body of the said Lady *Mary Montague* begotten; and the Heirs Males of the Body of such first Daughter ; and for default of

such Issue, then to continue, remain, be vested in, and held and enjoyed by all and every other the Daughter and Daughters of the Body of the said Lady *Mary Montague* begotten, severally and successively, one after the other, as they should be in priority of birth, the Elder of such Daughters and the Heirs Males of her Body to be preferred and take before the Younger of such Daughters and the Heirs Males of her Body; and for default of such Issue, then to continue, remain, be vested in, held and enjoyed by all and every the Daughter and Daughters of every other Daughter of the said Duke of *Marlborough* to be begotten, severally and successively, as they shall be in priority of birth, and of the Heirs Males of their respective Bodies issuing, the Elder Daughter of every such Daughter and the Heirs Male of her Body to be preferred and take before the Younger of such Daughters and the Heirs Male of her Body, the Daughter and Daughters of the Elder such thereafter-to-be-born Daughters and the Heirs Males of her and their respective Bodies issuing, to be preferred and take in manner aforesaid, before the Daughter or Daughters of the Younger of such after-born Daughter; and for default of such Issue, to all and every other the Issue Male and Female lineally descending of or from the said Duke of *Marlborough*, in such manner and for such Estate the same were by the said Act limited to the before-mentioned Issue of the said Duke, it being intended, and thereby enacted, that the said Honours should continue, remain, and be vested in all the Issue of the said Duke, so long as any such Issue Male and Female should continue, and be held and enjoyed by them severally and successively, in manner and form aforesaid; the Elder and the Descendants of every Elder

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Issue to be preferred before the Younger of such Issue : And to the intent that the said Honors, Manor and Park of *Woodstock*, and the House then erecting there, called *Blenheim*, and the Hundred of *Wootton* in the said County, and all other the Manors, Lands, Messuages, Tenements and Hereditaments, which in and by the the said Letters Patent were by her said Majesty, pursuant to the said Act of Parliament, granted to the said Duke of *Marlborough* and his Heirs, and the Advowsons by the said Letters Patent also granted, might always go along and be enjoyed with the Titles, Honours and Dignities as aforesaid, as thereafter it is mentioned, it was thereby further enacted, that the said Duke of *Marlborough* should stand and be seised of all the said Honor, Manor and Park of *Woodstock*, Manor-House and Premises, granted by the said last-mentioned Letters Patent, for and during his Life, without impeachment of Waste ; and from and after his Decease, that the same should be and remain unto, and be held and enjoyed by *Sarah Duchess of Marlborough*, Wife of the said Duke, for and during the term of her natural Life ; and from and after her Decease, the same should remain and be unto, and held and enjoyed by the Heirs Male of the Body of the said Duke of *Marlborough* begotten ; and for default of such Issue, that the same should be and remain unto, and be held and enjoyed by all and every the Daughters of the said Duke of *Marlborough*, and the Heirs Male of their respective Bodies issuing, and all others severally and successively, in such manner as the said Titles, Honours and Dignities aforesaid were thereinbefore limited and expressed to go and be enjoyed : And it was thereby further enacted, that the said Duke of *Marlborough*, and after his Decease the said Duchess of *Marlborough*, should have

full Power and Authority, by Deed indented, to make any Lease or Leases in Possession of all or any of the said Manors, Hundred, Messuages, Lands, Tenements and Hereditaments aforesaid, other than and except the House called *Blenheim*, and the Park of *Woodstock*, for any number of years, not exceeding twenty-one years, or for any number of years determinable upon one, two or three Lives, reserving the best and most improved Rent that could then be had for the same, without taking any Fine: And it was thereby further provided and enacted, That neither the said Duke of *Marlborough*, or the Heirs of his Body, nor any of his Daughters, or the Heirs Males of their Bodies, or any other Person to whom the Premises should come or descend by virtue of the Limitations aforesaid, should have any power by Fine or Recovery, or any other Act, Assurance or Conveyance in the Law, to hinder, bar or disinherit any other Person or Persons to or upon whom the said Manor-House, Lands, Tenements or Premises were thereby vested or limited, from holding or enjoying the same, according to the Limitations before in the said Act mentioned, other than and except such Leases as the said Duke and Duchess might make by virtue of the Powers thereinbefore mentioned, and such other Leases as Tenants in Tail might and were enabled to make by virtue of the Statute made in the 32nd year of the Reign of King *Hen. VIII.* and Grants of Lands or Tenements held by Copy of Court Roll, according to the Customs of the respective Manors aforesaid; but all such Fines, Recoveries, Acts, Assurances and Conveyances, other than such Leases and Grants by Copy as aforesaid, should be and were thereby declared and enacted to be void: And it was thereby further enacted, that the said Act should be adjudged,

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deemed and taken in all Cases, and in all Courts and Places, a *Public Act*; and further stating, that her said late Majesty was graciously pleased, at her own expense, to erect in the said Park of *Woodstock*, the Mansion-House of *Blenheim*; and to make or lay out the Gardens and Grounds thereof, as a Monument of the glorious Actions of the said Duke; and further stating, that by a certain other Act of Parliament, made and passed in the first year of the Reign of his late Majesty King *George I.* intituled, "An Act for enlarging the Fund of the Governor and Company of the *Bank of England*, relating to Exchequer Bills, and for settling an additional Revenue of 120,000*l.* per annum upon his Majesty during his Life, for the service of the Civil Government, and for establishing a certain Fund of 54,600*l.* per annum, in order to raise a Sum not exceeding 910,000*l.* for the service, by sale of Annuities, after the rate of six per cent. per annum, redeemable by Parliament; and for satisfying an Arrear for Work and Materials at *Blenheim*, incurred whilst that Building was carried on at the expense of her late Majesty Queen *Anne*, of blessed memory, and for other purposes therein mentioned, after reciting, amongst other things, the Act of Parliament wherein it was recited that her Majesty was pleased, at her own expense, to erect the House of *Blenheim*, as a Monument of the glorious Actions of the said Duke; and further reciting, that the building of the House of *Blenheim*, and making the Gardens and other Conveniences thereto belonging, were begun and carried on accordingly, at the expense of her said late Majesty, until the Works thereof ceased; the Charge of which said Building and Works, so far as the same were carried on, except the Debts remaining unsatisfied to

Artificers and others, was borne by her Majesty out of the Revenues which were appointed for the uses of the Civil Government; and reciting, that by an Act of Parliament made and passed in the 12th year of the Reign of her said late Majesty, she was enabled to raise 500,000*l.* on the Revenues appointed for the uses of her Civil Government, to be applied for or towards the payment of such Debts and Arrears owing to her Servants, Tradesmen and others as were therein mentioned; by which Act it was provided and enacted, that the said Sum of 500,000*l.* should be applied and disposed in aid of the Revenues or Branches which were appointed for support of her Majesty's Household, and of the honour and dignity of the Crown, for or towards the paying and discharging such Arrears and Debts as aforesaid; nevertheless, for the clearing of any doubt that may arise, whether the Debts which incurred and became due and then remained unsatisfied to Artificers and others for Work performed and Materials delivered, for or upon account of the Building and Works aforesaid, ought to be paid and satisfied by and out of the Arrears of her said Majesty's Revenues due at the time of her Decease, and the Monies then remaining of the Sum by the last above mentioned Act authorized to be raised, it was thereby declared, that all Debts which were actually incurred and grown due and then remained unsatisfied to Artificers and others for Work performed and Materials delivered for or upon account of the said Building and other Works at *Blenheim*, on or before the first day of June in the year of our Lord 1712, when her Majesty first caused the Payments on account of the said Buildings to be stopped, ought to be and the same were thereby accordingly directed and enacted to be paid out of the Monies then remaining of the aforesaid

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Sum by the last mentioned Act authorized to be raised, and out of the Arrears of the said Revenues granted to her Majesty, for the uses of her Civil Government as aforesaid, due at the time of her demise, in such and the like manner, and by such proportions only as other her Majesty's Debts were or ought to be paid and satisfied, as by said Acts of Parliament and Letters Patent, (to which Plaintiffs for greater certainty crave leave to refer,) when produced will appear:—That the said Estates so settled by the said secondly therein-before mentioned Act of Parliament, consisted, amongst other particulars, of the Mansion-House called *Blenheim*, and of the Park or Parks formerly called *Woodstock Park*, but now most usually called *Blenheim Park*, in which the said House was situate, and which was very large and extensive, and also the Pleasure-Grounds belonging to the said House, and divers Woods and Plantations adjoining to and holden with the said Mansion-House, and also divers other Lands, Tenements and Hereditaments holden and occupied therewith, and the said Park or Parks and Pleasure-Grounds had been and then were laid out and planted with great skill and taste, and in the most ornamental manner; and further stating, the said *John Duke of Marlborough* and *Sarah his Wife*, and *Lady Harriott Godolphin*, afterwards Duchess of *Marlborough*, departed this life without Issue Male, and the said Titles, Honours, Dignities and Estates have become and then were vested in the Most Noble *George Duke of Marlborough*, the Father of the Plaintiff *George Spencer Churchill*, who was then, under the Limitations of the said Act, Tenant in Possession in Tail Male, or to him and the Heirs Male of his Body, of all and singular the said Mansion-House, Park or Parks, and other the Estates aforesaid, so settled as aforesaid and further stating, that the

Plaintiff *George Spencer Churchill* was the eldest Son and Heir Male Apparent of the Body of the said *George Duke of Marlborough*; and as such, upon the decease of the said Duke, would be, under the Limitations contained in the said Letters Patent and in the said Act of Parliament, Tenant in Possession in Tail Male, or to him and the Heirs Male of his Body, of the said Titles, Honours and Dignities, and consequently of the said Mansion-House, or Parks or Park, and other the Estates aforesaid; and further stating, that the said *Anne Countess of Sunderland* had Issue, *Robert Earl of Sunderland*, who died without Issue, and *Charles*, late Duke of *Marlborough*, her second Son; and the said *Charles Duke of Marlborough* died in 1758, leaving *George* late Duke of *Marlborough* his only Son, who left Issue, *George* the present Duke of *Marlborough*, and *Caroline* late Wife of *Henry Viscount Clifden*, who lately died, leaving Plaintiff, *G. T. W. A. Ellis*, her eldest Son, who as one of the Issue and lineal Descendants of *John Duke of Marlborough* was, under the Limitations aforesaid, Tenant in Tail Male, or to him and the Heirs Male of his Body, or for such Estate as under the Limitations aforesaid he is entitled to in Remainder expectant upon the determination of the prior Estates of the said Honours, Titles and Dignities, and consequently of the said Mansion-House, and Park or Parks, and other the Estates aforesaid; and the other Descendants of the said *John Duke of Marlborough*, and who were and might be entitled to Estate and Interest in the said Estates were very numerous, and the said Plaintiffs were unable to discover who was the Person who, under the Limitations of the said Act, was entitled to the next Remainder or Estate after failure of the Issue Male of the said *George Duke of Marlborough*,

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nor had the said *Attorney General* been informed thereof:—That said Defendant had lately caused or permitted to be cut down several of the Trees in the said Park or Parks, and the Woods, Plantations and Grounds adjoining thereto, which were of great ornament to the said Mansion-House, Park or Parks, Grounds and Estate, or which otherwise afforded shelter to the said Mansion House, and divers Trees in the lines, avenues, ridings and clumps, or in the said Park or Parks and Grounds, which were planted for and greatly calculated to the ornament of the said Park or Parks and Grounds; and he had also caused or permitted to be cut down in the said Parks or Park, Plantations, Woods and Grounds, divers other Trees of an improper growth, and not to be cut for Timber; and in the most wasteful manner, to the great impoverishment of the said Estates, and to the disherison of the Petitioner, the said *George Spencer Churchill*, he had received considerable Sums of Money arising from the Sale of such several Trees as aforesaid; and he had also contracted with divers Persons for the Sale to them of large quantities of Timber, in pursuance of which Contract, he the said Defendant, or the Persons with whom he had so contracted, had marked or caused to be marked for cutting down a great number of Trees in the said Park or Parks, Plantations, Woods and Grounds, which were highly ornamental to the said Mansion-House, and Park or Parks, and Grounds, and some of which served for shelter to the said Mansion-House, and several of which stood in the lines, avenues, rides and clumps of and in the said Park or Parks, Woods and Grounds; and he the said Defendant intended to cause or permit the said Trees to be cut down, and to commit other acts of wanton and improvident Waste,

to the destruction or great impoverishment of the said Estate, and the disherison of the said *George Spencer Churchill*; and further stating, that if said Defendant should be allowed to commit such Waste as aforesaid, not only would Plaintiff, and all other Persons who, under the Limitations contained in the said Act of Parliament, would thereafter become entitled to the said Estates, be deprived in a great measure of the benefit intended for them by the said Act, but also the intention of the Crown and of the Public, as expressed in the said Letters Patent and Act of Parliament, would be defeated; the Plaintiff therefore submitted that such Proceedings and intended Proceedings of said Defendant did and would amount to a Fraud on the said Letters Patent and Act of Parliament, and therefore that said Defendant ought to be restrained by the Injunction of this Court from such Proceedings.

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The *Prayer* of the Bill was, That the said Defendant might answer the Premises; and that an Account might be taken, by and under the direction and decree of this Court, of all and singular the Trees which had been so cut down or felled by the order or with the permission of the said Defendant; and of the Monies which had been received by him, or by any Person by his order or for his use, from the Sale thereof; and that the said Defendant might be decreed to answer the amount of such Monies; and that such Timber as had been cut, and still remained in and about the said Park or Parks, Woods, Plantations or Grounds and Estates, might be sold by and under the direction and decree of this Court; and that the amount of such Monies as aforesaid, together with the amount of the Monies to arise from or by such Sale as last aforesaid,

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might be secured and invested by and under the like Direction and Decree for the benefit of the Persons entitled and to become entitled to the said Estates under the Limitations aforesaid ; and that the said Defendant, his Servants, Agent and Workmen, and all Persons with whom he had contracted for the sale of Trees or Timber, their respective Servants, Workmen and Agents, might be restrained, by the Order and Injunction of this Court, from cutting down Timber and other Trees growing in and upon the said Park or Parks, Woods, Plantations, Grounds and Estates, which had been or were planted or growing there for the protection or shelter of the said Mansion-House called *Blenheim*, or for the ornament of the said Mansion-House and Estates, and which grow or stand in lines, walks, vistas, clumps or otherwise, for the ornament of the said Mansion-House, or of the Gardens, Pleasure-Grounds or Parks, and other Grounds and Estates thereunto belonging ; and also from cutting down any Timber or other Trees in and upon the said Park or Parks, Plantations, Woods, Grounds and Estates, except at reasonable times, and in a husbandlike manner ; and from cutting Saplings and young Trees, not fit to be cut as and for the purposes of Timber, in and upon the said Park or Parks, Plantations, Woods, Grounds and Estates ; and from committing any other Waste, Spoil or Destruction in and upon the said Mansion-House, Park or Parks, Plantations, Woods, Grounds and Estates.

On the filing of the Bill, and Affidavits in support of the same, an Injunction was granted by the *Lord-Chancellor*.

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Mr. Bell, Mr. Heald, Mr. Wray, and Mr. Hampson,
in support of the Demurrer:—

The Act of the 3 and 4 Anne, c. 6, enables the Queen, by Letters Patent, to grant unto the Duke of Marlborough and his Heirs and Assigns for ever, the Honor and Manor of Woodstock, and the Hundred of Wootton, and also certain Manors and Lands there particularized, to be holden of her Majesty, her Heirs and Successors in free and common Socage, by Fealty; and rendering to her Majesty, her Heirs and Successors, on the 2d day of August in every year for ever, at the Castle of Windsor, one Standard or Colours, with three Flower de Luces painted thereupon, for all manner of Rents, Services, Exactions and Demands whatsoever.

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By the 2d Act, 5 Anne, c. 3, which in the Preamble states that the Queen had, by Letters Patent, granted the Lands mentioned in the first Act to the Duke of Marlborough and his Heirs, afterwards provides, that the Duke shall stand seised of such Lands for and during his natural Life, without impeachment of Waste; and from and after his Decease, the same shall be and remain unto, and be held and enjoyed by Sarah Duchess of Marlborough, Wife of the said Duke, for and during the term of her natural Life; and from and after her Decease, the same shall be and remain unto, and be held and enjoyed by the Heirs Male of the Body of the said Duke of Marlborough; and for default of such Issue, then the same shall be and remain unto, and be held and enjoyed by all and every the Daughters of the said Duke of Marlborough, and the Heirs Male of their respective Bodies issuing, and all others severally and successively, in such manner as the Titles, Honours and Dig-

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nities are before expressed and limited to go and be enjoyed.

Afterwards it is provided by the Act, that the Duke, and after his Decease, the Duchess, may grant Leases in possession of the Lands (except the House called *Blenheim*, and the Park of *Woodstock*,) for any number of Years not exceeding twenty-one, or for any number of Years determinable upon one, two or three Lives, reserving the best and most improved Rent that could be then had for the same, without taking any Fine; and it is also provided, that neither the Duke or the Heirs Male of his Body, nor any of the Daughters or the Heirs Male of their Bodies, or any other Persons to whom the Premises should come or descend by virtue of the aforesaid Limitations, should have Power, by Fine or Recovery, or any other other Act, &c. to bar the Estates.

Thus, by the first Act, the Queen was enabled to make a Grant in Fee to the Duke of the Lands, which she did; and thereby he became absolute Owner of the Fee, and might have disposed of it as he pleased. By the second Act, the Duke, at the instance of the Queen, and by his own desire, is made Tenant for Life of the Land previously granted in Fee, without impeachment of Waste, with a Remainder in Tail, the Lands being settled by this Act so as to go with the Honours, but still the Reversion remained in the Duke under the Grant made to him in Fee by the Letters Patent. This Case, therefore, is not within the 34 and 35 Hen. VIII. c. 20, which only applies to Tenancies in Tail granted by the Crown, as to which the Reversion is in the Crown. No Reversion being in the Crown, it does not appear on what ground the Attorney General

comes here, there being no right of the Crown to protect.

The present Duke is Tenant in Tail under this second Act; and the Question is, Whether, as such, he has not a right, if he pleases, to cut Timber on this Estate; or whether there are any Words in the Act to restrain him?

When the Case was before the *Lord-Chancellor*, he granted the Injunction, but said he did not remember any case expressly in point.

By the Common-Law, any Tenant, even Tenant for Life or for Years, might commit Waste, except in three cases: 1. Guardian in Chivalry: 2. Tenant in Dower: and 3. Tenant by the Curtesy. Then came the Statutes of *Marlbridge*, 52 Hen. III. c. 23. and of *Gloucester*, 6 Edw. I. c. 5. whereby it was provided, that a Writ of Waste should lie against any Farmer or others that held Lands for Life or for Years. The Statute of *Marlbridge* only gave single Damages; that of *Gloucester*, treble, and a Forfeiture of the Place wasted.

By express words, a Tenant for Life might be made without impeachment of Waste; and Courts of Law held, that the Tenant for Life under such Words might do what Waste he pleased. Upon this, Courts of Equity interfered; and on the ground that a Tenant for Life could not have been intended under those Words to have a power to commit destructive Waste, by which the Interests of those in Remainder would be in a great measure destroyed. *Lord Bernard's Case* (b) was not, as hath been supposed, the first Case in which Courts of Equity so interfered. In *Abraham v. Bubb* (c),

(b) 1 Salk. 161; 2 Vern. 738. (c) 2 Freem. 53.

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Case in question arose, whether she could commit Equitable Waste. No authority, however, can be

referred to Trustees to preserve Contingent Remainders, the Life Estate of the Wife did not merge in the Estate Tail in Remainder limited to her, and that having had only an Estate Tail in *Remainder*, she became only Tenant in Tail after, &c. in *Remainder*, (if, indeed, she had that Estate at all;) and that never having been Tenant in Tail in *Possession*, she, if Tenant in Tail after, &c. in *Remainder*, had no right to cut Timber; that right only attaching to a Tenant in Tail, after, &c. who had before been Tenant in Tail in *Possession*: but that if she was to be considered as Tenant in Tail after, &c. in *Possession*, she had a right to cut Timber, and apply it to her own use. It is remarkable, that in the Argument of the Case at *Law*, no mention whatever was made of the Estate limited to the Trustees to preserve, &c. upon which Limitation the *Lord-Chancellor* laid so much stress, and which seems to have occasioned the principal difficulty of the Case. Though not adverted to in the Argument, the Judges may, however, have taken it into their consideration; but whe-

ther they considered her as Tenant in Tail after, &c. in *Possession*, or in *Remainder*, cannot be gathered from the Certificate; nor on what grounds, there being contradictory doctrines, they held she was entitled to apply Timber cut to her own use. It would be trespassing too much on the Reader, and unsuitable perhaps to the nature of this Work, to enter into an elaborate consideration of the Cases; but after a diligent attention to them, it appears that they fully warrant what seems to have been the opinion of the *Lord-Chancellor*. It may, however, be observed, that the right of a Tenant in Tail after, &c. to apply Timber she cuts to her own use, so expressly negatived in *Harlackenden's Case*, does not appear to be overruled by what was held in *Lewis Bowles's Case*, at least, according to *Lord Coke's Report*; the only point in *Harlackenden's Case*, there overruled, seeming to be the Opinion of Chief Justice *Wray*, and Mr. Justice *Manwood*, in *Moyle Finch's Case*, relating to the rights of *Tenant for Life*. It is true that Injunctions have

adduced to show that a Tenant in Tail has ever been enjoined from committing equitable Waste. He has a clear Common-Law Right to commit Waste; and even in those cases where an Estate Tail is granted by the Crown, and the Reversion remains in the Crown, as to which the Statute 34 and 35 *Henry VIII*, c. 20, enacts, that a Recovery, by a Tenant in Tail of Lands, granted

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been granted to prevent *malicious Waste* by a Tenant in Tail after, &c.; and this admits what is clear Law, that she may commit Waste that is not malicious; but it does not determine that if she cut Trees, she is entitled to the produce of them. The being disipunishable of Waste does not prove she is entitled to Timber cut. By the Common-Law, the Clause, "without impeachment of Waste," only exempted a Tenant for Life from the penalty of the Statute, but did not give the property in the thing wasted. *Lewis Bowles's Case*, 11 Co. 79, first determined that he had the *property*; but it does not therefore follow, that a Tenant in Tail after, &c. may not be in the same situation as the Tenant for Life, previous to *Lewis Bowles's Case*; and in *Abrahall v. Bubb*, a Show. 69, Lord-Chancellor *Finch* took the distinction between where a Man is not punishable for Waste, and

where he may commit Waste. The opinion, however, expressed by the *Lord-Chancellor*, that a Tenant in Tail after, &c. is not only entitled to cut Timber, but to apply the produce as her own property, seems reasonable, and to be warranted according to *Lewis Bowles's Case*, as reported in Roll; and this being also the opinion of the Court of *King's Bench* when that Case went to Law, the point seems now to be settled. Every difficulty might have vanished if the *Judges of the King's Bench* had stated the *Reasons* on which they founded their *Certificate*; but for want of knowing the Principles and Authorities on which they built their conclusions, the subject, it is apprehended (except so far as relates to the right of Tenant in Tail after, &c. to apply the produce of Timber cut to her own use), has become still more involved and perplexed than it was before.

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for public Services, shall have no effect (*l*), still the Tenant in Tail may, it is apprehended, commit Waste, that Statute not having limited the Powers of a Tenant in Tail, except as to barring the Reversion in the Crown. The Acts only restrain the Duke from Alienation; in all other respects he is Tenant in Tail. Tenants in Special Tail, by the Common-Law, had a limited Fee Simple, and when Alienation was prevented by the Statute *De Donis*, yet there was not any change in their right to commit Waste (*m*).

In Lord *Glenorchy v. Bosville* (*n*), Lord *Talbot* said, "a Tenant in Tail may commit Waste in Houses, as well as in all parts of the Estate, notwithstanding any restraint to the contrary; and no instance can be shown, where a Tenant in Tail has been restrained from committing Waste by the Injunction of this Court." He also observed that, "an Injunction was refused in Mr. *Saville's* Case, of *Yorkshire*, who being an Infant, and Tenant in Tail in Possession, and in a very bad state of health, and not likely to live to full age, cut down, by his Guardian, a great quantity of Timber just before his Death, to a very great Value; the Remainder-man applied here for an Injunction to restrain him, but could not prevail."

Is the Timber on this Estate to remain for ever un-

(*l*) By the Common-Law, it seems, independent of any Statute, a common Recovery had no effect on a Remainder or Reversion in the Crown. See a Roll. Abr. 293, 4. In Grants by the Crown, it is usual to reserve a Reversion, which the

Grantee cannot bar. *Browning v. Wright*, 2 Bos. & Pul. 25.

(*m*) See 11 Rep. 81, a.

(*n*) For. 16. S. C. MS. but no notice taken of what was said as above, respecting Mr. *Saville's* Case.

alienable? Such a construction would counteract two well known principles of Law; one, that a Tenant in Tail has an absolute dominion over the Estate; the other, that Property ought not to be inalienable. If Timber becomes unsightly (*o*), or is decaying (*p*), or there is an offensive

(*o*) In *Lord Mahon v. Lord Stanhope*, before the late *Master of the Rolls* (Sir Wm. Grant), 9th March 1808, MS. where the Bill, amongst other matters, *prayed* an account of equitable Waste which had been committed, and an Injunction against further Waste, *His Honor* said, "As the Court cannot determine what is ornamental Timber, it being merely a matter of taste, they therefore say, that what was planted for Ornament, must be considered as ornamental. That the Defendant has cut down some Trees of this description is apparent, but it was by no means clear that they were cut down under circumstances which could be considered Waste in the eye of this Court. For if a Tempest had produced Gaps in a piece of ornamental Planting, by which unequal and discordant breaks and divisions were occasioned, it would be going too far to hold, that cutting a few Trees to produce an uniform and consistent, instead of an unpleasant and disjointed

appearance, should be construed Waste."

(*p*) In *Bewick v. Whitfield*, 3 P. Wms., where a Bill was filed by a Remainder-man, praying, that decaying Timber might be cut down, it was held, by Lord Macclesfield, that with regard to Timber *plainly decaying*, it is for the benefit of the Persons entitled to the Inheritance, that it should be cut down, otherwise it would become of no value, but this shall be done with the approbation of the *Master*; and Trees though decaying, if for the defence and shelter of the House, or for Ornament, shall not be cut down. The Decree was, for "the *Master* to inquire what Timber there is standing on the said Estates, that is in a decaying condition, which is neither a Shelter or Ornament to the Seat; and that such decaying Timber, as the *Master* shall direct, shall be cut down from off the said Estate, and sold by such Persons as he shall appoint for that purpose;

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Drain or a Stable, which is a Nuisance, is the Duke to be prevented from removing it? Are all Tenants in Tail, with the Reversion in the Crown, to be in this condition? Is the Estate to be incapable of Improvements? Is it to be said, that if all the Family agree to cut the Timber, that they are to be prevented doing so, and by a remote Heir? The case of the Countess of *Shrewsbury v. Earl of Shrewsbury* (*p.*), does not apply; the Question there was, Whether, on paying off an Incumbrance, he should be considered as a Tenant for Life, as to the paying off the Incumbrance, or Tenant in Tail, the Reversion of the Estate being expressly reserved to the Crown; that was only a question of *intention*; and though in paying off that Incumbrance, he was considered as acting with the views of a Tenant for Life, the Estate being inalienable, yet that is not a Decision, that to *all* purposes he was to be considered as a Tenant for Life. There is nothing in the Act expressly restraining the Duke from cutting ornamental Timber; an alienation of the Estate is all that is restrained; he is left with all the Rights of a Tenant in Tail. It will be said, perhaps, that the Duke may cut

and out of the Money arising by the sale of such Timber, the Costs of all Parties to this Suit (to be taxed by the said *Master*) are to be first paid; and the residue of the said Money is to be put out at Interest on Government or other Security, in the names of Trustees, to be approved of by the said *Master*, for the benefit of the said Plaintiff, *Robert*

Bewick, the Infant, to be paid him when he comes of age; and the Trustees are to declare the Trust of the said Money, and all Parties are at liberty to apply to this Court from time to time, as there shall be occasion, for further directions." Reg. Lib. 1733, fol. 512. See 3 P. Wms. 268, n. 2.

(*p.*) 3 Bro. C. C. 190. S. C.
1 Ves. jun. 227.

Timber so as to improve the Estate; but that would be to introduce a new doctrine as to Waste; the doctrine of the Court, where it has interfered to prevent equitable Waste, has been, that Trees planted for Ornament, however bad the Taste, must be preserved (*q*). It is fit we should adhere to the old course of Law; by departing from it we may see what we shall gain, but not what we shall lose.

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The Solicitor-General, and Mr. Sidebottom, contra :—

The Question in this case is of great importance, not only to the Individuals concerned, but to the Public. The Question is, Whether the present, or any future Duke of *Marlborough*, can destroy Property which was given as a perpetual Monument of British gratitude for the then unparalleled Services of the first Duke? The Demurrer must be taken to admit, that the Duke has cut down, and intends to cut down, Timber planted for Shelter and Ornament. We do not insist, that he ought to be prevented cutting down *any* Timber, but only such as was planted for *Shelter* and *Ornament*. The Crown has a right to interfere. The same principle, which is to warrant the cutting down of ornamental Timber, would justify the demolition of the House. The Estate emanated from the Crown; it was given for public Services, and on public grounds; and it is interested in seeing the Gift is not abused. If the two Acts, the Act of the

(*q*) In —— v. *Copley*, 1806, MS., where the Defendant by his Answer stated, he had cut down Trees for the improvement of the Estate, Lord *Erskine* granted an Injunction against cutting down ornamental Timber, and Trees planted in the situations of others cut down, *but without prejudice to the thinning of Trees for the sake of ornament*.

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3 and 4 *Anne*, c. 6, and the Act of the 5 *Anne*, c. 3, are to be taken together, it must be considered as an Estate settled by the Crown, the Reversion of which is in the Crown. Even where there is no Reversion in the Crown, as in the case of a Bishopric, the Attorney General, on behalf of the Crown, may interfere to prevent the Bishop from committing Waste (q). Suppose collusion between all the Parties interested in this Estate, might not the Crown interfere to protect it? The Plaintiff, the Marquis of *Blandford*, is the next in succession; Mr. *Welbore Ellis Agar*, it is true, has a more remote Interest; but they are entitled (certainly the Marquis is entitled) to file such a Bill as this.

This Estate was originally granted to the Duke of *Marlborough* in Fee, but afterwards it was thought proper that the Estate should always accompany the Title, and for that purpose the 5 *Anne*, c. 3, was passed. It is an Estate peculiarly limited by Parliament, and cannot, strictly speaking, be termed an Estate Tail (r). There is no power to alienate. The Act enables the Duke to grant Leases for twenty-one Years, or three Lives, which was an unnecessary Provision if he was to take an Estate Tail, for to such an Estate such a Power is incident by Law. When an Estate Tail is granted, with a Reversion in the Crown, still the Tenant in Tail is entitled to make such Leases. The

(q) *Knight v. Moseley*,
Ambler 176.

(r) Vid. the *Prince's Case*,
[8 Co. 1.] "Where it appeareth
that an Act of Parliament may

limit an Inheritance of Lands
or Tenements, otherwise than
Common-Law would do, and
create a new Estate of Inhe-
ritance." Co. Litt. 27 a.

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Legislature could not, therefore, have supposed that they were settling an Estate Tail on the Duke. If it is to be considered as an Estate Tail, with all its legal incidents, except that of Alienation, it will follow as a consequence that the Wife of the Duke will be dowable, and the next Duke might only take two-thirds of the Estate, for the Act provides only against Acts of the *Party*, but Dower is by *Act of Law*. So, if the Title and Estates descended to a Daughter, her Husband might be Tenant by the Curtesy; and if the Title and Estates descended to a Daughter, and the Daughter left four Daughters only, the Estate must go to them in Coparcenary, although the Title would go to the Eldest. None of these circumstances can take place under the Settlement by these Acts. It is plain, therefore, that Parliament did not mean to settle an Estate Tail. Parliament may and has here created a new Estate; it is a Statutory Estate of a peculiar nature, not an Estate Tail; it resembles more a Tenancy for Life without impeachment of Waste. Suppose, however, for the sake of argument, that this Estate is properly termed an Estate Tail, or a qualified Estate Tail; still there being an express Clause to prevent Alienation, it is a Case in which, according to the principle upon which other cases have been decided, this Court will interfere to prevent the destruction of ornamental Timber and of the House.

What the Common-Law doctrine is as to Waste, is scarcely necessary to be considered, since this is an application founded upon the equitable doctrines of this Court. By the Common-Law, a Tenant in Tail after possibility, &c. might have committed what Waste he

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pleased; but Lord *Hardwicke*, in *Aston v. Aston* (*s*), mentions *Abrahall* and *Bubb* (*t*), and classing it with the case of Tenant for Life without impeachment of Waste, observes that, "extravagant and humoursome Waste," was in that case restrained. He mentions also *Williams v. Day* (*u*), where Lord *Nottingham* declares he would stop the pulling down Houses in the Case of Tenant in Tail *apres* possibility, &c.; which Lord *Hardwicke* observes, is carrying it a good way. There is a subsequent Case, *Anon.* (*x*), where the *Master of the Rolls* granted such an Injunction. In *Garth v. Cotton* also, Lord *Hardwicke* cites as Law, the determination in *Abrahall* and *Bubb* (*y*). A Tenant for Life without impeachment of Waste, and a Tenant in Tail after, &c. are both put in the same class, with respect to relief in Equity against Waste, and why? because each has a limited Estate; each is without a power of Alienation; and it is unreasonable and against conscience, that they should destroy the Estate, and exercise an absolute power as if they were, or could become, owners in Fee (*z*). In *Cooke v. Winford* (*a*), on a Motion to stay a Jointress, Tenant in Tail after possibility, &c. from committing Waste; the Court held, that she being a Jointress, within the 11th Hen. VII. ought to be restrained, being part of the Inheritance, which

(*s*) 1 Ves. p. 265.

(*t*) 2 Freem. 53. S. C. 2 Show. 69. 2 Eq. Abr. 757.

(*u*) 2 Ch. Cas. 32.

(*x*) 2 Freem. 278.

(*y*) 2 Dick. 209.

(*z*) One who is or may become Owner in Fee of the Estate, has powerful reasons of

self-interest, not to destroy the Estate by improper Waste; not so, one who has a limited Interest.

(*a*) 1 Eq. Cas. Abr. This seems to be the Case which is afterwards mentioned in the same Book, p. 400, under the Name of *Cooke and Whaley*.

by the Statute, she is restrained from aliening, and therefore granted an Injunction against *wilful Waste*. In *Williams v. Williams* (*b*), it is stated *arguendo*, in support of the Demurrer, that this Case of *Cooke v. Winford* is not to be found in the *Registrar's Book*, probably because, as it appears on a search since made, the real Title of the Cause was *Cookes v. Whateley, alias*

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which is a more correct Statement of the Case. The first Statement is, that an Injunction was granted generally against "wilful Waste;" and in the second Statement, that the Injunction was against "wilful Waste in the site of the House, and pulling down Houses."

The only account which appears in the *Registrar's Office*, of the Order made in this Case, is in the *Minute Book*. The following is a Copy of the Minutes.

"*Joris, 5 Feb. 1701.*

Lord Keeper, Sir William Child, Mr. Gery, Mr. Rogers.

Sir Thomas Powis prays an Injunction to stay Waistes.

An Affidavit read.

Vernon p' Questioner.

Dobbins p' Defendant.—We are in Tenant in Tail after possibility of Issue extinct, and it hath been adjudged in this Court that they could not be constrainyd.

11 Hen. VII.

Pooley p' Defendant.—We are Tenant in Tail after possibility &c. and they would have this Court doe what they refused to doe.

Wright for Defendant.

Sir Thomas Powis p' Questioner.—Doe hope this Court will interpose, that they shall not commit Waiste, and that this Cause shall be heard

Vernon, the Question doth not come up to the Precedents cited by the Defendant.

The Articles read.

Cur.—Take an Injunction to stay any willfull Waistes in defacing the scite of the Mansion-House, but noe other Injunction.

Cur.—Take an Injunction to stay any willfull Waistes in any of the Houses."

(b) 15 Ves. 419. see p. 421. The same objection was made to this Case, when it was argued in the Court of K. B. See 12 East, 213, 218.

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Winford. The *Minutes* of the Order have been found, and it appears an Injunction was granted, to restrain wilful Waste in the Houses. The Case of the Countess of *Shrewsbury v. Earl of Shrewsbury (c)*, which was cited when the *Lord-Chancellor* granted the present Injunction, and which his Lordship thought analogous in principle, has a material bearing upon the present Question. It is a Rule, that if a Tenant in Fee or in Tail pays off an Incumbrance, it is presumed the Estate was meant to be discharged; but if a Tenant for Life pays off an Incumbrance, the presumption is otherwise, and the *onus* lays upon them, who contend the Estate was meant to be discharged, to show that it was so meant. But in the Case alluded to, as *Lord Shrewsbury* was Tenant in Tail by Grant from the Crown, but expressly restrained from alienation, *Lord Thurlow* thought he ought to apply the same Rule to a Tenant in Tail so restricted, paying off an Incumbrance, as was applied to a Tenant for Life. So, in *Robinson v. Litton (d)*, an Infant Tenant in Tail, was, at the instance of Contingent Remainder-Men, enjoined from cutting down Timber. The legal restraint there, owing to Infancy, was thought to afford a sufficient ground to interpose by Injunction, on behalf of those in Remainder. It has been said, that if Timber planted for ornament cannot be cut, it must stand for ever; but what is the consequence if it may be cut? The Estate might be laid Waste, the House destroyed, and this great national Monument of British Valour, and British Gratitude, annihilated!

(c) 3 Bro. C.C. Ves. 12. 1 Vez. 526. and reported 3

(d) Mentioned *arguendo* in Atk. 209.

The VICE-CHANCELLOR:—

This is a Case of very considerable importance, not only from the very high degree of interest which must necessarily attach to the Case in itself, but because its Decision involves some of those principles upon which a very important branch of the Jurisdiction of this Court depends.

[*His Honor* here stated the Substance of the Information and Bill, and of the Demurrer.]

It is admitted, by the Counsel who support this Information, that the Defendant, the Duke of Marlborough, has, as incident to his Estate, a right to cut down all Timber other than Timber planted for ornament or shelter; but it is contended, that under the special provisions of the 5th *Anne*, c. 3, the Duke has not an Estate Tail, and is for that reason within the principle of those Cases in which Courts of Equity interfere to restrain the cutting of Timber planted for ornament or shelter; or that, if the Duke of Marlborough can be considered as having an Estate Tail, yet being restrained by the provisions of the Statute from defeating the succession of those to whom the Estate is limited after him, and the Reversion being in the Crown, he is therefore within the same principle of equitable restraint as to the cutting of Timber planted for ornament or shelter.

That an ordinary Tenant in Tail may, at his pleasure, cut down all Timber for whatever purposes planted, admits of no question, and it is hardly necessary to advert to the origin of that particular species of Tenure. It grew out of the ancient Conveyances to a Man, and to the Heirs of his Body. Under such a Conveyance,

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it was held at Common-Law, that until Issue born, he had not the absolute Property in the Estate, it being limited by the Grant, not to his general Heir, but to the Heirs of his Body; but that the moment Issue was born, the Condition being performed, the Estate became absolutely his Property, and he could dispose of it in the same manner as if he had held it in Fee-Simple. The Legislature, however, thought fit to interfere, and by the Statute of *Westminster*, the second, (commonly called the Statute *De Donis*, 13 Edward I. c. 1.) it was declared, that the Will of the Donor or Grantor should be observed, and that an Estate so granted to a Man and the Heirs of his Body, should descend to the Issue, and that he should not have power to alienate the Estate. In the construction of that Act of Parliament, it was held, that a Tenant in Tail remained with the same unqualified and absolute Ownership of his Estate, as he had before that Statute, with the single exception of the restraint on Alienation. In that restraint of Alienation was included, Alienation by Lease; Leases being considered, according to the construction of that Statute, as partial Alienations; but by the subsequent Statute of the 32 Hen. VIII. c. 28, a Tenant in Tail is permitted to make certain Leases mentioned in that Statute. With the exception, therefore, of Alienation including Leases, unless according to the Statute, a Tenant in Tail is at this day to be considered as much the absolute Owner of the Estate as a Tenant in Fee Simple, and as such, may do what he pleases with the Buildings and Timber on the Estate. Such being the Law, it is to be considered what this Act of Parliament has done in settling this Estate upon the Issue of the first Duke of *Marlborough*. Has this Statute conferred upon the Members of this noble

Family, from time to time as they succeed to the possession of this Property, that Estate which by the Law of the Country is called an *Estate Tail*, subject to qualification? or, has it given to the successive Possessors of this Property, some peculiar and anomalous Estate before unknown to the Law? The Act recites the former Grant of the Estate to the Duke in Fee, and the quality of his Interest in his Dignities. It then states the intention of the Legislature, on account of his eminent Services, to confer upon his Family, that is, upon his Issue of all Descriptions, the same Honours. The Statute then proceeds to declare the limitation of the Peerage. The Duke, it seems, had three Daughters: the Eldest was married to the Son and Heir of Lord *Godolphin*, the Second to the Earl of *Sunderland*, and the Third to the Earl of *Bridgewater*. The Act of Parliament takes up the Succession according to the Seniority. It begins with Lady *Harriett Godolphin*, and settles the Honours and Dignities upon the Heirs Male of her Body; and failing the Heirs Male of Lady *Godolphin*, it settles them upon Lady *Sunderland*, and the Heirs Male of her Body; and on failure of her Heirs Male, the Honours and Dignities are settled upon Lady *Bridgewater*, and the Heirs Male of her Body; and then upon Lady *Mary Montagu*, her youngest Daughter, and the Heirs Male of her Body. Failing all these Heirs Male, it then proceeds to settle the Honours and Dignities upon Lady *Godolphin*, and her first and other Daughters, and the Heirs Male of their Bodies, and so as to the other Daughters; and the Act ultimately provides that the Honours and Dignities shall remain in the Issue of the Duke so long as any such Issue, Male or Female, shall continue. And having then concluded the Limitations with respect to the Honours and

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Dignities, it proceeds to deal with the Estate; "to the intent that the Estate so granted shall always go along and be enjoyed with the Titles, Honours and Dignities as aforesaid, as thereafter is mentioned;" and it is enacted, that the said Duke of *Marlborough* shall stand and be seized of all the said Honor, Manor and Park of *Woodstock*, and the Manor-House and Premises granted by the said last-mentioned Letters Patent, during his Life, without impeachment of Waste. And it is further enacted, that from and after his Decease, the same shall be and remain upon, and be held and enjoyed by *Sarah Duchess of Marlborough*, Wife of the said Duke, for and during the term of her natural Life; and from and after her Decease, the same shall be and remain upon, and be held and enjoyed by the Heirs Male of the Body of the said Duke of *Marlborough* begotten; and for default of such Issue, that then the same shall be and remain upon, and be held and enjoyed by all and every of the Daughters of the said Duke of *Marlborough*, and the Heirs Male of their respective Bodies issuing, and all others severally and successively, in such manner as the said Titles, Honours and Dignities aforesaid, are thereinbefore expressed and limited to be taken and be enjoyed. The effect of the Act of Parliament is, therefore, the same as if it had proceeded to repeat here, with regard to the Estate, those same Limitations which had been previously declared with respect to the Honours and Dignities. The present Duke of *Marlborough* is now in possession of this Property under the Limitation to the Heirs Male of the Body of *Lady Sunderland*, who was the second Daughter; for we know historically that *Lady Harriett Godolphin* died without Issue in the life-time of her Father. The Question is, what

is the Estate which that Limitation, by the Law of England and this particular Law, confers upon the Duke of *Marlborough*. The Legislature must be held to have intended, where there is no expression to the contrary, to use legal terms in a legal sense. This Limitation, simply stated, is a mere Estate Tail descendible to the Heirs Male of the Body. If the Act of Parliament had stopped here, then this would be the common case of a Tenant in Tail, who has by Law the absolute property in the Timber; the absolute property in the House; and who may at his pleasure pull down every brick he finds upon the Estate, and destroy every sapling that grows upon it: that is the necessary consequence of the Estate which would be conferred by these words. The Court cannot act upon what was fit to be conferred, but must look at what the Legislature has conferred upon the Duke. But then the Act of Parliament, continues thus: "Provided always, and be it further Enacted by the Authority aforesaid, that neither the said Duke of *Marlborough* or the Heirs Male of his Body, nor any of his Daughters or the Heirs Male of their Body, or any other Person to whom the Premises shall come or descend by virtue of the Limitation aforesaid, shall have any power, by Fine or Recovery, or any other act, assurance, or conveyance in the Law, to hinder, bar or disinherit any the Person or Persons to or upon whom the said Manors, House, Land, Tenement, Hereditaments or Premises are hereby vested or limited, from holding or enjoying the same, according to the Limitations before in this Act mentioned." In the first place it is to be observed, that this is an express admission by the Legislature, that the Estate conferred upon the Issue of the Duke of *Marlborough*, by the previous Limitations, was an Estate capable of being

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barred by Fine or Recovery, or in other words, was an Estate Tail, to which alone, the bar by Fine or Recovery is applicable; and this provision is, therefore, nothing more than a declaration on the part of the Legislature, that the Estate Tail, given to the Issue of the Duke of *Marlborough*, should, in this respect, lose one of the incidents which belong to it by the principles of Law, namely, the power of barring the Entail by Fine or Recovery; and necessarily, therefore, leaving every Tenant in Tail in possession, with every other legal incident which belongs to the nature of his Estate, and, consequently, leaving him as much the absolute Owner of the Timber and Buildings on the Estate, as if he were Tenant in Fee-Simple. It has been argued, that this is not to be considered as an Estate Tail; because, being inseparably annexed to the Honours and Dignities, which are limited to the eldest Daughters, the Estate will descend, not as an Estate Tail does at Common Law, to all the Daughters, but to the elder Daughter singly. If this be the effect of the Statute, then it must be admitted, that another qualification is here introduced to the legal incidents of an Estate Tail, leaving still to that Estate all those legal incidents which are not touched by the Statute. The same observation applies to the argument, that the Wife of a Duke of *Marlborough* would not, like the Wife of an ordinary Tenant in Tail, be dowable of this Estate. My opinion, therefore, is, that the Issue of the Duke of *Marlborough* were, by the Statute, successively made Tenants in Tail of this Property; and that they have all the legal rights and incidents which belong to an Estate of this character, except where such rights and incidents are specially qualified by the provisions of the Statute; and that there being no qualification with respect to the right

of cutting Timber, they are as much the legal Owners of the Timber upon this Property, as if they were Tenants in Fee Simple. It remains to be considered, whether there is a principle of Jurisdiction in a Court of Equity to restrain the legal Incidents of an Estate Tail, with respect to Timber, either because the Estate Tail cannot be barred, or because the Reversion is in the Crown? Abstractedly considered, it would seem to be a singular proposition to state, that if a Tenant in Tail, without the power of barring the Successor, has by Law a right to deal as he pleases with the Building and the Timber upon his Estate, that a Court of Equity can assume a Jurisdiction to alter the Law and deprive the Tenant in Tail of the legal Incidents of his Estate; that if the Law makes a Tenant in Tail absolute Owner of the Timber, a Court of Equity, which is bound to follow the Law, is to make a new Law, and to say, that a Tenant in Tail shall not be the absolute Owner of the Timber. But whatever objection there might be, abstractedly considered, to such a principle, yet if in a long course of proceeding, evinced by Precedents and Records, and sanctioned, as it were, by common consent, such a Jurisdiction has, in this particular case, been exercised by successive Judges, I agree that it is now too late to inquire into the origin of that Jurisdiction. It is pressed upon the Court, that there is a course of Precedents which necessarily establish a Jurisdiction to that extent. It is not, however, alleged that such a Jurisdiction has ever been actually exercised in the particular case of a Tenant in Tail, whose Estate is not barable, but that it has been exercised in analogous cases. The great body of authorities relate to the case of Tenant for Life, without impeachment of Waste; but it is to be observed, that the Ownership of the Timber is not a legal Incident to the Estate of Tenant for Life. He takes his Interest in the Timber by the provision of the

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Grantor; and Courts of Equity seem to have interfered upon the Construction and Intention of the Grant—to have considered that the Grantor meant to confer a full power of temporary Enjoyment, without the power of destroying or altering the character of that Property, which he had limited over in succession to others. In the Case of *Robinson v. Lytton*, Lord Hardwicke expressly grounded his interference upon the Intention of the Testator, and upon the circumstance, that the Heir was a Trustee for other Persons (*f*), and the Injunction was not confined to Equitable Waste. The case of a Bishop bears no application, for there a Court of Law will interfere by Prohibition. *Knight v. Moseley* (*g*) was not a Case of Equitable Waste. The case of a Tenant in Tail, after possibility of Issue extinct, is, however, urged as being altogether in point; and there is, certainly, authority that such a Tenant in Tail has been considered within the principle of equitable Waste. The common case of a Tenant in Tail after possibility of Issue is extinct, is where the Estate is descendible to the Issue of the Wife alone: until the death of the Wife without Issue, this Estate has all the legal Incidents of other Estates Tail; but upon the death of the Wife without Issue, the Estate has no longer a descendible quality, and the Husband's interest, is, in effect, limited to his life. His Estate becomes ranked in the Law amongst Estates for Life; and he may make exchange with a mere Tenant for Life. In *Lewis Bowles's Case* (*e*), however, it was held at Law, that as he had, before the death of his Wife, an Estate Tail, and was once Owner of the Timber, that notwithstanding the death of his Wife, and the change in the quality of his Estate, he should still continue unim-

(e) 11 Co. 79. See *Lord Hardwicke's Note* of that

(f) See 10 Ves. 276, in ^{the} same case, to the same effect.

which *Lord Eldon* states from (g) Ambl. 176.

peachable of Waste. In a Court of Law, therefore, a Tenant in Tail after possibility of Issue extinct, is, in effect, a Tenant for Life without impeachment of Waste; and Courts of Equity have, in the question of equitable Waste, confounded him with other Tenants for Life without impeachment of Waste, and have not entered into the distinction, that he is unimpeachable of Waste, not by the provision of a Grantor, but as a legal Incident to his Estate. If, however, this question as to the Tenant in Tail after possibility of Issue extinct, is now to be considered as the settled doctrine of the Court, it is not in point to the present case: the Duke of Marlborough is not at Law Tenant for Life without impeachment of Waste. The case of Tenant in Tail, without the power of barring his Issue, is common to every case where the Reversion is in the Crown; and no instance can be stated in which a Court of Equity has ever interfered against such a Tenant in Tail, upon the principle of equitable Waste. I cannot feel myself at liberty, therefore, to extend this Jurisdiction of a Court of Equity beyond the limits of all former precedent. The argument of inconvenience has been very strongly pressed upon me; it has been said that the necessary consequence of such a determination must be, that this Monument of National Gratitude will be at the mercy of every successive individual who may happen to have the possession of it. There is some inconvenience, however, and something like absurdity, on the other side. If this Court is in all time, to protect all Trees planted here for ornament or shelter, then the taste of the first Proprietor with respect to the Gardens and the House, is for ever to remain impressed upon this Property, how little suited soever it may be to the altered notions of succeeding ages, with regard either to beauty or convenience.

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nience. Arguments of inconvenience are sometimes of great value, upon the question of intention. If there be in any Deed or Instrument equivocal expressions, and great inconvenience must necessarily follow from one construction, it is strong to show that such construction is not according to the true intention of the Grantor. But where there is no equivocal expression in the Instrument, and the words used admit only of one meaning, arguments of inconvenience prove only, want of foresight in the Grantor; but because he wanted foresight, Courts of Justice cannot make a new Instrument for him; they must act upon the Instrument as it is made. It is said that the Duke may demolish the Mansion of *Blenheim*, and reduce this noble possession to a Desert. It is true he may; but he enjoys this Estate under a Grant from the Legislature, and we can only look into that Grant to see, whether or not the Legislature meant to leave him at liberty to do so. If we find upon looking into the Act, that the Legislature meant to repose a confidence in the successive Possessors of this Property, that they would deal with it as became their high rank and situation, a Court of Equity cannot repeal the Law, and recal that confidence which the Legislature have given. The Legislature have calculated upon that feeling which belongs to all great and good minds; they have considered that the successive Possessors of this splendid Property would always deal with it according to the sentiments which belong to Persons in their exalted stations of life; that their Pride and Honour would always lead them to maintain this magnificent Monument of National Gratitude; and it is not to be believed, that any Member of this noble Family will ever act, with respect to this Property, upon other Principles.

Demurrer allowed.

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The VICE-CHANCELLOR:—

Since we last met, an Act of Parliament has occurred to me not mentioned in the Pleadings, or insisted upon in the Argument; I mean the Act of the 5 Anne, c. 4, by which a Pension is settled on the Duke of Marlborough, and his Posterity, out of the Revenues of the Post Office. It appears to me, upon reading that Act, together with the two other Acts stated in the Pleadings, that there is reason for contending, on other principles than those of equitable Waste, that the Public has an Interest in the House of Blenheim, which every Court of Justice is bound to protect. The Act of the 5 Anne, c. 4, is a public Act to which the Court is bound to advert.

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Though the Bill is principally framed to prevent the cutting of ornamental Timber, yet there is an Allegation that the Duke means to commit Waste generally, and the Duke, by the Demurrer, in effect, insists that he has a power to commit Waste generally; but if the House of Blenheim must be preserved, he must equally preserve the Timber which serves as ornament or shelter to it. I wish, therefore, the Case to be re-argued, not upon the point of equitable Waste, as to which I am, upon reflection, confirmed in the opinion which I have already expressed upon it, but as to the Question, whether the Legislature have not imposed upon the successive Members of this Family, an obligation to maintain the House of Blenheim.

The Case was now re-argued.

24th Dec.

Mr. Bell, Mr. Wray, and Mr. Hampson, in support of the Demurrer:—

There are three Questions to be considered: 1. Whether Waste can be committed on the House;

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2. Whether Waste can be committed, not only as to the House, but also as to ornamental Timber; 3. Whether the Information and Bill are so framed as to entitle them, by Injunction, to prevent Waste as to the House.

The Duke must be considered as Tenant in Tail, under this Act; and if he is restrainable for Waste, it must be in respect of some special Provisions in the Acts of Parliament, taking away the right which a Tenant in Tail has by the Common-Law, of cutting Timber, ornamental or otherwise. But there is no such restriction; if there is any such, it can only be inferred, there is nothing expressed. It cannot be supposed the Legislature meant the House and Timber should be preserved in all respects the same, though the taste of the age altered, or Timber was rotting. Suppose the Timber had been planted, so as to represent the Battle of *Blenheim*, or the twelve signs of the Zodiac, or according to the most grotesque taste, is that to be continued for ever? It was never meant to deprive the Posterity of the Duke of all the comforts of Property, or the power of improving the Lands according to the taste of the age, and of fashioning the House so as to increase its conveniences. In the restraint upon Alienation, in the 5th *Anne*, c. 3. s. 5. no mention is made of the House, nor in any part of that Act are there any express words against the commission of Waste. If no claim can be made in respect of Dower, or of a Tenancy by the Curtesy, it must be found in some provision of the Act; but there is none. In the Act of the 5th *Anne*, c. 4. settling the Pension upon the Duke, it is in the Preamble recited what had been done, and the Act settles the Pension in the same

way as the Titles and Lands had been settled. The Pension was at first granted by Letters Patent of the Queen; and the subsequent Act was merely a substitution of the former Grant. In *Davis v. Duke of Marlborough* (*f*), the Lord-Chancellor considers the Act (5 Anne, c. 3.) as having converted the Duke into a Tenant in Tail of the Estates, of which he was then Tenant in Fee (*g*); and at the instance of a Creditor, who had obtained, by way of Security, an assignment of the Estate and of the Pension, a Receiver was appointed as to the Rents and Profits of the Estate, but refused as to the Pension, because the Duke is, by the Act (*h*), personally to give a Receipt for that. In the present case, the attention of the Legislature was not called to the power which the Heirs of the first Duke would have over the Timber and the House; and if it had, it would probably have left it to the honour of the Parties, or would, as in the instance of the Parliamentary Settlement on the Duke of Wellington, have enabled Trustees or the Court to decide how, and by what rules, Improvements might be made.

(*f*) 1 Swanston, 74.

(*g*) 1 Ibid. p. 83.

(*h*) 5 Anne, c. 4 s. 3. The words of the Act are, "That the acquittance or acquittances of the said Duke, and of every other Person to whom the said Annuity or yearly Pension of 5,000*l.* after the decease of the said Duke, shall come, descend, remain or belong, by virtue of this Act, shall be a good

" and sufficient voucher and discharge for the payment thereof; and every such payment shall be allowed upon the respective Account and Accounts of the aforesaid Officer and Officers, Person or Persons paying the same, without any further or other Warrant or Authority whatsoever, to be had or obtained for that purpose."

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The only charge in the Bill, is, that ornamental Timber had been cut, some of which were ornamental to the Mansion-House, and served for shelter, and that he intends to cut down and commit other acts of wanton and improvident Waste; but it is not stated that any Waste has been committed or threatened as to the Mansion-House. If the Duke were, by an Answer, to deny he had committed or intended to commit the Waste charged in the Bill, he might do so with correctness, although he had committed or intended to commit Waste on the Mansion-House. It is true, the Prayer of the Bill is for an Injunction against cutting of ornamental Timber, "and from committing any other Waste or destruction in and upon the said Mansion-House, Parks, &c.," but that applies only to the kind of Waste before stated in the Bill. If, therefore, on the construction of the Acts, Waste could not be committed on the House, the Demurrer is good, because the Bill only applies to the Timber and not to the House. They cited *Cresseth and others* against *Mytton* (i).

The Plaintiff's Counsel were stopped by

The VICE-CHANCELLOR:—

Having reflected much upon this subject, before and since I took the liberty to call it a second time to the consideration of the Bar; and having listened with all the attention I am master of, to the several arguments addressed from the Bar, I am confirmed in the opinion which I formed out of Court, upon reading the two Acts of Parliament stated in the Pleadings, together with the Act granting the Pension, not stated in the Pleadings, nor referred to in the former Argument.

(i) 3 Bro. C.C. 481. and S.C. 1 Ves. p. 449.

All these Acts being *in pari materia*, are to be taken together, in order to form a sound conclusion as to the intention of the Legislature with respect to every part of the subject. I disclaim any authority to construe an Act of Parliament other than according to the expressed intention. A Court of Equity, as well as a Court of Law, must be bound by the expression of an Act of Parliament, and must declare the Law as it finds it. But the sense and meaning of an Act of Parliament, and the intention of the Legislature in it, is not only to be deduced from direct expression, but is to be collected by implication, from the whole language of the particular Act of Parliament, and of the other Acts of Parliament which are *in pari materia*.

The first question is, whether, if the Statute does restrain the Duke of Marlborough from the destruction of the House of Blenheim; is that question material to the consideration of this Demurrer, according to the present state of this Record?

The Duke of *Marlborough* is charged by the Information and Bill, with committing acts of Waste and Destruction, by cutting Timber ornamental to the Mansion-House, Park, and Estate, or which otherwise afforded shelter to the Mansion-House, and Trees in lines and avenues, as well as Timber of an improper growth; and that he had contracted to cut down more Timber of the same description, which was marked out to be cut down; and states also, that he intends to commit other acts of wanton and improvident Waste. I take these latter words to mean, Waste and Destruction upon the Estate *eiusdem generis* as that before mentioned, that is, by cutting Timber. The Duke's Demurrer, therefore, ad-

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mitting, for the purpose of the argument, the statement of the Bill, and insisting that he has a right to do all that is alleged; does, in effect, insist upon an unrestrained right to cut Timber. I am of opinion, that if the Duke is bound to maintain the House of *Blenheim*, he has not an unrestrained right to cut Timber, but must maintain also all Timber which is essential to the ornament or shelter of the House; and that the state of this Record necessarily involves the question whether the Statute does restrain the Duke from the destruction of *Blenheim* House. The next consideration is, whether there is plain expression or necessary implication, that it was the intention of the Legislature that the House of *Blenheim* should be maintained, in all times, as the Residence of the Family, although, with respect to the Estate generally, the legal rights of Tenant in Tail were given to those who were successively to enjoy the Honours and Dignities of the Family, except where those rights are specially qualified or restrained? The Duke of *Marlborough*, by the Act of the 4 *Anne*, received from the public gratitude, through the Grant of the Crown, the Honours, Manors and Estate of *Woodstock*, in Fee Simple; and we find in the Preamble of the Act that he received it as a reward for his eminent National Services. At this time the Duke of *Marlborough* had not the Titles as at present limited, but the Titles were limited in the ordinary course, descendible only to the Heirs Male of his Body; but it was afterwards considered by the Sovereign and Parliament to be fit that this illustrious Person should have this pre-eminent distinction, that all the Dignities successively granted to him should be limited to every possible issue that might descend from his body. When these Honours were about to be conferred, the Duke became

desirous (for so it appears upon the recital of the next Act of Parliament) that the Estate which had been granted to him in respect of his National Services, should be annexed to those Dignities which were at all times to descend to his Posterity, for the purpose of maintaining and supporting them; and the Sovereign and the Parliament, upon this special occasion, consented to depart from that principle of legal policy which forbids the making of Estates inalienable. The Act of the 5 Anne, c. 3, was passed for both purposes, and the Title of that Act runs thus; "An Act for "the settling the Dignities and Honours of John Duke "of Marlborough upon his Posterity, and annexing "the Honours and Manor of Woodstock and House "of Blenheim to go along with the said Honours." And then the Act recites that it appeared to the Queen that it would be proper that the Honour and Manor of Woodstock and the House of Blenheim should always go along with the Titles, and she did therefore recommend the matter to the consideration of Parliament. The Act then proceeds to grant the Honours and Dignities to all possible Issue of the Duke, and to annex to those Honours the Manor and Park of Woodstock, and the House then erecting there, called Blenheim, and all the Estate which was granted to the Duke in Fee Simple, in pursuance of the 3d and 4th Anne.

The next Statute of the 5th Anne, c. 4, which was not noticed in the former Pleadings, nor in the first Argument, recites this important fact, that the House of Blenheim was erected at the Queen's expence, as a Monument of the Duke's glorious Actions; and proceeds to settle a Pension of 5,000*l.* a-year from the Post Office, upon the Duke and his Posterity, for the

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more honourable Support of their Dignities, in like manner as his Honours, and the Honour and Manor of *Woodstock*, and the House of *Blenheim*, were already limited and settled. The Question then is, taking these three Acts together, whether the Legislature meant by the 5th *Anne*, c. 3, so to annex this House of *Blenheim*, thus built at the Public Expence, and as a National Monument, to the Honours and Dignities, that it should, as a distinct subject, descend in all times as a suitable Residence for those who enjoyed such pre-eminent distinctions; or, whether it was meant to be confounded with the rest of the Estate, and that the Possessors for the time being were to have the same rights of Property over it, as, in their character of Tenants in Tail, they would necessarily have over the other parts of the Estate? I cannot read these several Acts, and attend to the circumstances of this Property, and observe the manner and purpose of building this House of *Blenheim*, and the special annexation of it to the Honours and Dignities of this Family, so particularly recited in the last Act, without stating that there appears to me to be clear and necessary Implication that it was the intention of the Legislature that the House of *Blenheim* should in all times, as a distinct subject, descend and be enjoyed with the Honours and Dignities of this Family; and that it was not the intention of the Legislature that the successive Possessors of these Honours and Dignities should have the rights of Property over it, which, with respect to the rest of the Estate, were legally incident to their character of Tenant in Tail. I think the Legislature thus imposed upon every Possessor of these Honours and Dignities, the obligation to maintain the House of *Blenheim* for the future Residence of those to whom the Succession was limited; and that this

Court is bound to interfere to prevent its destruction. I am clearly of opinion, that the Duke of *Marlborough* having no power of destruction over the House, has no power of destruction over Timber which is essential to the shelter or ornament of the House; and I must overrule a Demurrer which, in effect, insists upon an absolute and unqualified right to cut all Timber.

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It does not, however, follow that the absurdity is now to take place which would have taken place if the case could have been supported upon the principle of equitable Waste—that the taste of the first Proprietor must in all times remain impressed upon the Property. It does not follow, that because it was the intention of the Legislature to compel the successive Dukes of *Marlborough* to maintain the House of *Blenheim*, that therefore it was the intention of the Legislature that they should enjoy the Property without the elegancies and conveniences which belong to the change of times. The Court will distinguish between Improvement and Destruction. If any act be done by the Duke, which the Remainder-man shall consider as tending to destruction, the Court will decide upon the quality of the act complained of. But in the present state of the case, it is not necessary to say by anticipation, what may or may not be so considered.

Demurrer overruled.

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16th Jan.

BELLCHAMBER v. GIANI.

NOTICE of a Motion had been given at a former Seal. The Motion was not made; and on an Application under the late *General Order (a)*, 40^s. Costs were given. The Motion was now renewed by Mr. *Cullen*, but the Costs of the former Motion were not paid; and on Mr. *Wakefield's* objecting, that the Motion could not be made until the Costs occasioned by the former Notice of Motion were paid, as directed,—the *Vice-Chancellor* concurred in the objection, and refused to hear the Motion.

(a) 5th August 1818. See ante, p. 318.

18th Jan.

KENWORTHY v. ACCUNOR.

Upon an Injunction Bill to stay Proceedings at Law, where the Defendant is abroad, a Motion that service of the Subpoena upon the Attorney of the Plaintiff at Law, may be deemed good service, must be accompanied with an Affidavit by the Plaintiff in Equity, as to Merits, and not by his Solicitor, unless he should happen to have personal knowledge of the Merits.

THIS was an Injunction Bill, to stay Proceedings at Law; and on a Motion on behalf of the Plaintiff, that service of the Subpoena on the Attorney of the Defendant, who was abroad, might be deemed a good service, a Question was made, whether the Affidavit of Merits, which is necessary where the Plaintiff at Law is abroad, should be made on the Motion for the service of the Subpoena on his Attorney at Law, or on the subsequent Motion for the Injunction; and whether such Affidavit of Merits might be made by the Solicitor?

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subsequent security need not be memorialized; and the usual order was made for the sale of the lease, valuation of the annuity, &c. [*Ex parte Price in re Palmer*] - - 132

2. *Quare*, Where annuities are given out of a residue, and no time of payment is directed by the will, whether the annuities commence before the end of one year from the testator's death? Where the time of payment is fixed by the will, as in this case, the first quarter-day after the testator's death, the payment must be as directed. [*Storer v. Prestage*] 167

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2. *Quare.* Where annuities are given out of a residue, and no time of payment is directed by the will, whether the annuities commence before the end of one year from the testator's death? Where the time of payment is fixed by the will, as in this case, the first quarter-day after the testator's death, the payment must be as directed. [*Storer v. Prestage*] 167

ANSWER.

See PRACTICE, 7.

APPEAL.

See PRACTICE, 30.

N N

ASSIGNEE.

See BANKRUPTCY, 14.

ATTORNEY.

See EXECUTOR, 3.

BANKRUPTCY.

See COMMISSIONERS FOR THE REDUCTION OF THE NATIONAL DEBT.—COSTS, 1.—DEMURRER, 6.

1. One of two assignees having quitted the country, a petition was presented by the remaining assignee, that the bargain and sale to the two assignees might be vacated, and that a choice should be made of a new assignee in the stead of the one abroad; and that a new bargain and sale might be executed to the petitioner and the new assignee; and that service of the petition at the last place of residence of the assignee abroad, might be deemed good service. On production of an affidavit of service of the petition, an order was made, according to the prayer of the same. [*Ex parte Bonbonous, in re Leman*] - - 23
2. A bill of costs by a solicitor, under a commission of bankruptcy, though approved by the commissioners, and stated and allowed in the accounts of the assignees, held to be taxable, under 5th Geo. II. c. 30, s. 46. [*Ex parte Gregson*] - 49
3. Where a firm of four persons become bankrupts, the creditors of a firm of three of such bankrupts,

may, under Lord Rosslyn's general order, prove under the commission against the four; and no order is necessary for that purpose. [*Washington ex parte, in re Gray and others*] 26

4. A. and B. on entering into partnership, agreed that the manufactory and utensils in trade should be the separate property of A., and that B. should pay a rent in proportion to his share of the business. The manufactory and utensils were insured in the name of A.; they were subsequently consumed by fire, and afterwards a commission issued against A. and B. Held, that the insurance money formed part of the separate estate of A. and was unaffected by the 21st Jac. I. c. 29. [*Ex parte Smith, in re Bakewell and another*] - - - - - 63
5. Order made, on motion, that service of a petition in bankruptcy on the attorney of a person abroad, whose debt was sought to be expunged, should be deemed good service. [*Ex parte Palon, in re Anderson*] - 116
6. G. accepted a bill for J. and W. J. for 493*l.*; and they gave him a bill, drawn by others on another firm, but did not indorse the bill. On the bankruptcy of J. and W. J., the acceptance of G. having been paid by him before their bankruptcy, he was allowed to prove against their estate, after deducting what he had received on the bill given by them to G.; such bill being considered only as a security. J. and

- W. J. got G. to get discounted at the Bank, a bill for 853*l.*, but they did not indorse the bill. The proceeds of the bill, when discounted, were paid to J. and W. J.; the bill was dishonoured, and G, as indorser, paid the amount to the Bank. Held, that G. was entitled to prove against the estate of J. and W. J. after deducting what had been received under the commission against the acceptors of the bill. [*Ex parte Hustler, in re Goodchild*] - 117
7. By a settlement previous to a marriage, there was a covenant by the husband, that his executors should pay 3,000*l.* to trustees, six months after his death; and that if he should become a bankrupt, that sum should be proveable under his commission. By a settlement made by the wife of her property, before the marriage, contingent interests were given to the husband. The husband became bankrupt; and, on a petition by the trustees, to be allowed to prove the 3,000*l.* under his commission, it was held, they could only prove to the amount of what the husband's contingent interest in the wife's property sold for under his bankruptcy. [*Ex parte Young, in re Lark and another*] - - - 124
8. Proof was offered before the commissioners of a debt of 5,000*l.* which was refused. A petition was presented, for leave to prove a debt of 10,000*l.*; but as the petitioners had only offered to prove a debt of 5,000*l.* they were not permitted to petition to prove a debt of 10,000*l.* [*Ex parte Fry*] - - - - - 132
9. If bills be given as a security for a debt, the party has a right to prove his debt, after deducting what he has received in respect of the bills. [*Ex parte Rathbone*] - - - 134
10. Sale of goods, to be paid for at the end of the year in which they were purchased, but if paid for before the end of the year, 20 per cent. discount to be allowed. They were not paid for within the year; and held, on the bankruptcy of the purchaser, that proof could not be made of the whole debt, without deduction for discount. [*Ex parte Pigou and another, in re Harvey*] - - - 136
11. Bankrupt, before his bankruptcy, on a loan of stock, gave a bond to re-transfer the principal within three years, and pay the amount of the dividends in the mean time; and also agreed to convey a real estate as a security. No re-transfer was made, nor any dividends paid. Held, that on his bankruptcy the security should be sold, the dividends paid out of the produce, and that stock should be purchased; and if not sufficient to re-purchase the whole principal stock, that proof should be made under the separate estate for the remainder: and that the assignees were not entitled to have three years to re-transfer the stock. [*Ex parte Fisher and another, in re Barker*] - - - - - 159
12. C. and D. were in partnership, and the same was dissolved; D.

- carried on afterwards a trade, and he became bankrupt; and C. was insolvent. Held, that the joint creditors of C. and D. could not prove against the separate estate of D. [*Ex parte Janson, in re Corf*] 229
13. A commission may be taken out by an executor, before he has obtained probate. [*Ex parte Paddy, in re Drakeley*] - - - - 241
14. Assignee discharged from being such, on his own petition, but on terms. [*Ex parte Thorley, in re Roberts*] - - - - 273
15. On a petition to expunge the debt of C. D. the examination of a witness on a former occasion, as to a debt sought to be proved by A. B., cannot be read. [*Ex parte Coles, in re Coles and another*] - - 315
16. Bankrupt, previous to the commission against him, procured persons to assign an interest in copyhold premises, as a security, to a creditor of his. The creditor may prove under the commission, without delivering up such security. [*Ex parte Goodman, in re Goodman*] - - 373
17. A bargain and sale in bankruptcy may be vacated prospectively, so as not to affect antecedent conveyances. [*Ex parte Corry*] in note, 474 [*Ex parte Harris, in re Buchanan and Benn*] - - - - 473
18. Petition to supersede a commission. No person appeared for the respondent; but as the petition stated an action was brought to try the validity of the commission, the petition was directed to stand over until the action was tried. [*Ex parte Price*] - - - - 228
19. Debt of a creditor in *America* proved by an agent. On petition to expunge the same, service of the petition allowed, on motion, to be made on the agent. [*Ex parte Dunlop*] - - - - - 279
20. When a petition to supersede a commission is presented by a bankrupt, and an issue is directed, the Court will order the petition to stand over until such a fixed time, as, in all probability, the issue will be tried; and if from any circumstance the trial at law does not take place within the prefixed period, the bankrupt must make an affidavit, satisfactorily accounting for the delay of the trial, otherwise his petition will be dismissed. [*Ex parte Ranken*] 371
21. In future, no commission shall be superseded, on the ground of the consent of all the creditors who have proved their debts having been given, until after the second meeting; but on the commissioners being satisfied at the second meeting, that a petition will be presented for superseding the commission, with the consent of all the creditors who shall have proved debts, the commissioners are to adjourn the choice of assignees to some future day, in order to give the opportunity of presenting such petition for a supersedesas. [*General Order*] - 392

BIDDINGS.

See PRACTICE, 12.

BILL OF LADING.*See INTERPLEADING BILL.***CHARITY.**

1. A sum of money was bequeathed to erect a *Blue Coat School*, and establish a *Blind Asylum*, with a direction that lands should not be purchased, and the expression of an expectation that lands would be given for the charities. The bequest held not to be void, under the Mortmain Act. [*Henshaw and others v. Atkinson and others*] 306
2. On demurrer, held that the increased value of certain charitable gifts belonged to the charities. [*Attorney General v. Mayor of Bristol*] - - - - - 319
3. A bequest of 7,100*l.* to be laid out in the funds, and the interest and dividends to be applied in providing a proper school-house, held to be a good charitable bequest, as a school-house might be hired. A bequest of residue for the benefit of such public and private charities as the executors may think fit, and amongst others to establish a life-boat at *Brightelmstone*, held good; but that money on a mortgage and lease did not pass, as being void under the statute, but that fixtures in the house, which was on lease, formed part of the residue, and passed. [*Johnston and others v. Swann and others*] - - - - - 457

COMMISSIONERS FOR THE REDUCTION OF THE NATIONAL DEBT.

Certain stock standing in the name of the bankrupt, the dividends of which had not been claimed, was, under the 56 Geo. III. c. 60, transferred to the commissioners for the reduction of the national debt. The assignee of the bankrupt, by petition under the act, claimed the stock as part of the bankrupt's effects. Another person by petition claimed the stock, insisting that the bankrupt was a trustee for him. A reference was directed to the Master, to ascertain whose stock it was, and in the mean time the stock was directed to be transferred into the name of the accountant-general. [*Ex parte Gillett, ex parte Bacon*] - - - - - 28

CONDITIONAL DEVISE.*See DEVISES AND BEQUESTS, 1.***COPYHOLDS.**

1. R. P. being entitled to two copyholds, surrendered one to the use of his will, and bequeathed both copyholds to his trustees and executors in trust, for his grandson. The trustees and executors renounced probate, and were not admitted. The son of R. P. was afterwards admitted to the copyholds and he surrendered, for a valuable consideration, to one *Holloway*, who surrendered to the father of the plaintiff, by whom the copyholds were bequeathed to the plaintiff,

Held, as to the copyhold which R. P. surrendered to the use of his will, that the plaintiff, his grandson, was entitled, though thirteen years had elapsed from the time he became adult, and that the defendant was a trustee for and must surrender to him; and an account was directed of timber cut; and also of the rents and profits for the last six years. [*Pearce v. Newlyn*] 186
 2. The custom of a manor was, that if a tenant for life of a copyhold obtains a grant in reversion in the name of a third person, such person is entitled beneficially, unless a trust is mentioned on the rolls of the manor. Held, the custom was reasonable, and that the persons who were named in the reversionary grants of the copyholds were not trustees, but beneficially entitled. [*Edwards v. Fidel and others*] - - - - - 237

COSTS.

See DEVISES AND BEQUESTS, 1.—

DONATIO CAUSA MORTIS.—MORTGAGOR AND MORTGAGEE, 1, 2, 3, 5.—PLEA, 2.—PRACTICE, 15, 30.

1. A bill of costs by a solicitor under a commission of bankruptcy, though approved by the commissioners, and stated and allowed in the accounts of the assignees, held to be taxable under 5th Geo. II. c. 30, s. 46. [*Ex parte Gregson*] - 49
2. Cause, on coming on to be heard, directed, on an objection made by the defendant's counsel, to stand

over for want of parties, with liberty to amend; but defendant was refused the costs of the day, his answer not stating the objection for want of parties. [*Mitchell v. Bailey*] - - - - - 61

3. A trustee is entitled to his costs, unless he acts from motives of obstinacy and caprice. [*Taylor and Ux. and others v. Glanville*] - 176
4. Answer stating a tender of tithes before bill filed, but not proved, will not save costs. [*Milnes v. Derision*] - - - - - 374
5. Creditor proceeding at law against an executor, after notice of a decree against him to account, is so far in the nature of a contempt of court, that upon an application for an injunction the court will refuse him the costs of the further proceedings at law, and the costs of the application. [*Curre v. Bowyer*] 456

CROSS BILL.

See PRACTICE, 7.

CUSTOM OF MANOR.

See COPYHOLDS, 2.

DEMURRER.

See CHARITY, 2.

1. Demurrer allowed to a bill by one of the next of kin, for the delivery up of a pretended will, &c., and for the appointment of a receiver of the property of the intestate, until letters of administration were granted by the Ecclesiastical Court; it being

- unnecessary to have the will delivered up; and no ground being stated, to show that such letters of administration could not be immediately obtained. [*Jones v. Frost and others*] - - - - 1
2. One of seven persons entitled to a certain aliquot share in an ascertained sum standing in trustees names, filed his bill against the trustees, and the other *cestuis que trust*, to have his share transferred. Demurrer, for want of equity by the *cestuis que trust* defendants, allowed. [*Smith & Snow v. Snow and others*] 10
3. Bill against a feme covert, seeking an account of monies received under a will fraudulently obtained by her, and placed out in securities in trustees names, and that the same may be repaid out of her separate estate. General demurrer overruled. [*Greatley v. Noble and others*] 79
4. A. B. and C. agreed to purchase a ship, and that it should be registered in the name of A. and B. only, but the profits of the ship to be divided by the three. C. filed a bill against A. and B. for an account of the profits of the ship. A general demurrer was put in. On the ground of public policy the agreement was held to be illegal, and the demurrer allowed. [*Battersby v. Smith*] 110
5. Motion, that a demurrer to interrogatories by a witness might be overruled, refused, not being supported by affidavit. [*Parkhurst v. Lowder*] - - - - 121
6. On demurrer, held, that a bankrupt cannot file a bill against a debtor to his estate, on the ground of the invalidity of the commission, and of collusion between his assignees and the debtor; the proper course being, an action to try the validity of the commission, or a petition to remove the assignees. [*Hammond v. Attwood*] - - 158
7. A demurrer to an amended bill, need not be intituled as a demurrer to the original and amended bill, but as a demurrer to the amended bill. [*Smith and others v. Bryon*] - - - 428
8. Demurrer, for want of equity, overruled; the plaintiff, by his bill, claiming under a settlement stated in the bill, but which the bill represented as incapable of being set forth with certainty, the same being in the defendant's possession. [*Wright and Ux. v. Plumptre and others*] 481
9. On demurrer, held, that trustees, to whom a discretionary power was given of renewing leases, had not an arbitrary power of renewal, but must renew when most for the benefit of the *cestui que trust*. [*Miltington v. Mulgrave and others*] 491

DEVISES AND BEQUESTS.

See LEGACY.—CHARITY.

1. Devise and bequest of lands and furniture to A. H. testator's wife, for life, and after her death, to H. L. and her assigns for life, in case she continued single and unmarried; and after her decease, unto such person, &c. as she should by deed or will appoint; and for want of appointment, to A. L. and to M. L.

their heirs, &c. as tenants in common; but in case the said H. L. should marry in the life-time of A. H. and with her consent, or after her death, with the consent of J. T. and T. L., or the survivor (signified in writing), then H. L. and her assigns should enjoy the lands and furniture in the same manner she would have done if she had continued single and unmarried. A. H. the testator's wife, and also J. T. and T. L. died; H. L. took possession of the estate, and married. Held, that H. L. took an estate for life, with a power of appointment, subject as to her life-estate only to the condition of her remaining sole and unmarried, which was a condition subsequent; and as the compliance with it became impossible by the *act of God*, her estate for life became absolute, and she might execute the power of appointment. Specific performance decreed, therefore, against a purchaser of the fee from H. L., but without costs, a fair objection having been made to the title. [*Aislabie v. Rice*] 256

2. Testator bequeathed to his wife, his furniture at D. C. and at W.; he afterwards removed part of the furniture at D. C. to B. S. Held, furniture at B. S. did not pass. [*Heseltine v. Heseltine*] - - 276
3. A direction by a testator, that his executors shall pay an annuity, unless circumstances render it "unnecessary, inexpedient, and impracticable," means, unless "in the opinion of his executors," circum-

stances shall so render it. The judgment of the executors in this respect, not controllable by a court of equity, unless they act *mala fide*. [*French v. Davidson and others*]

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4. Bequest to A. for life, and afterwards to B.; but if he should be then dead, to C. and D. in equal shares, or the whole to the survivor of them. B. died in the life of the tenant for life, as did also C. and D. Held, that the gift to C. and D. was a vested interest in them, as tenants in common, subject to be divested, if one only should survive the tenant for life. [*Browne v. Lord Kenyon and others*] - - - - - 410
5. Bequest to two executors and the survivor, 1,000*l.* 4 per centa. in trust for testator's two nieces, to pay them the dividends thereof from time to time; and from and after the decease of the two executors, the 1,000*l.* stock to go to the two nieces, their executors, administrators and assigns, equally. Held, that the two nieces took absolute equitable interests in the stock, as tenants in common during the life of the executors, and that on their deaths they took absolute legal interests as tenants in common. [*Gardiner v. But*] 425
6. Testator exempts his personal estate from the payment of mortgages on his real estate, which he devises to Lord C. subject to the incumbrances. Held, that descended estates were liable to discharge the mortgage. [*Barnewell and others v. Lord Cawdor*] - - - - - 453

DEPOSITIONS.

Depositions taken in a cause where a tenant in tail was defendant, are binding on another tenant in tail, who came *in esse* before a decree, and who took as tenant in tail prior to the former tenant in tail who had been made a defendant. [*Ld. Westmeath v. Lady Westmeath*] - 436

DONATIO CAUSA MORTIS.

Gift of a bond, by delivering the same, and saying, "There, take that, and keep it," in the last sickness of the donor, he dying two days after; held, to be a *donatio causa mortis*, and donee directed to be at liberty to use the executor's names, in suing on the bond, he indemnifying them; and the costs of the suit to be paid out of the testator's estate. [*Gardner v. Parker and others*] 184

EJECTMENT BILL.

An heir at law, out of possession, cannot file a bill for possession of the estate and title-deeds, &c. [*Crow and others v. Tyrrell*] - - - 179

ELECTION TO PROCEED AT LAW OR IN EQUITY.

See PRACTICE, 36.

EQUITABLE MORTGAGE.

See MORTGAGOR & MORTGAGEE, 3.

EQUITABLE WASTE.

See INJUNCTION, 5.

EVIDENCE.

See BANKRUPTCY, 15—*DEPOSITIONS*.

1. On a bill by assignor and assignee of a debt, for the recovery of the same, stating the assignment; it is not necessary to prove the assignment, though the defendants state they are ignorant of it. [*Ryan and others v. Anderson and others*] 174
2. A witness to a deed must not only prove his own attestation, but also the execution of the deed [*Hill v. Uncett, Loxley v. Hill*] - - - 370

EXCEPTIONS.

See ELECTION.

1. The Master, by his report, stated, he had not allowed a discharge to the executor, for want of evidence, but had received a claim. The report was excepted to; and it was admitted the evidence before the Master did not warrant the claim, but that additional evidence clearly established it. Held, that to support the exception, it must be shown that the Master ought to have allowed the discharge, on the evidence before him; and that if the Master refused to act upon the additional evidence, a distinct motion should be made for a direction that he should receive it. [*Ridifer and others v. O'Brien and others*] 43

2. Original bill filed, and answer put in. The bill was amended, stating a new case, but containing some of the same interrogatories as were used in the original bill. Held, on exceptions to answer to the amended bill, that a new case being made by that bill, that the interrogatories must be answered; though some were the same as in the original bill. [Mazarredo v. Maitland] 66
3. A motion cannot be made to take an answer off the file, because it is delusive, answering only a few facts stated in the bill. Exceptions must be taken. [Marsh v. Hunter] 437
4. Exceptions do not lie to a Master's report of costs, nor can there be a re-taxation in respect of mere quantum; but on a special case made by petition, either of irregularity in the proceedings, or that the Master, in his taxation, acted upon a mistaken principle, the Court will interfere. [Fenton v. Crickett] - - - - - 496
- applied part in payment of funeral expenses, &c. and paid the rest into his banker's hands, mixing it with his own money. The bankers failed; and held, he was liable to pay the money to the legatees. [Fletcher v. Walker] - - - - - 73
2. Executor, by schedule to his answer, acknowledging that he had received the testator's property, and lent it on a promissory note, ordered to pay the money into Court. [Vigrass and another v. Binfield and another] 62
3. An executrix, in respect of her receipts as such, being considerably indebted to the estate; held, that an annuity, to which she was entitled under the will, should, as it became due, be applied in payment of such debt; and that her solicitor had a lien for his taxed costs, upon any payment of the annuity to which the executrix might be entitled, after payment of what was due to the estate. [Skinner v. Sweet] 244

FEME COVERT.

See BANKRUPTCY, 13.—DEMURRER, 9.—DEVISSES AND BEQUESTS, 4.

1. Testatrix directed her executor to sell two houses, and invest the produce (after payment of her debts) in real or government securities, and to pay the interest to her three nephews, until they attained 21; and as each attained that age, to have one-third of the principal. The executor sold the houses, and

1. Wife cannot, by consent in Court, dispose, in favour of her husband, of her reversionary interest in personalty. [Pickard v. Roberts] 384
2. A married woman, separated from her husband, and having a separate maintenance, renders the same liable, by accepting a bill of exchange. [Stuart and Ux. v. Viscount Kirkwall] - - - - - 387

FRAUD.

See COPYHOLDS.—GIFT.—LEASE.

GIFT.

Deed of gift ordered to be delivered up, as obtained by undue influence over the donor, who was eighty-four years old, and nearly blind, and placed a confidence in the donee. [*Griffiths v. Robins*] - 191

GOOD WILL.

See PARTNERSHIP, 1.

HEIR AT LAW.

See EJECTMENT BILL.

IMPERTINENCE.

See PRACTICE, 38.

INADEQUACY OF CONSIDERATION.

See VENDOR AND VENDEE, 7.

INFANTS.

Infants are bound by the conduct of their solicitor in a cause. [*Til-lotson v. Hargrave*] - - - 494

INJUNCTION.

1. Injunction, to restrain defendant from receiving a testator's effects, and to stay trial of actions, granted before answer, under the circumstances. [*Mowfield and others, v. Shaw*] - - - - - 100
2. An action was commenced in July 1816, and tried at York assizes in July 1817. On 21st January 1818, a new trial was granted; whereupon

plaintiff filed his bill for a discovery, and obtained the common injunction. The new trial at York, was fixed for the 7th of March. On a motion to extend the injunction to stay trial, the same was refused, with costs. [*Field v. Beaumont and Ux.*] - - - - - 102

3. Bill for an injunction to restrain proceedings at law for rent, on the ground of an agreement, under which the landlord was indebted more than the amount of the rent. Held, on demurrer, that it was a legal set-off, and demurrer allowed. *Quare*, Whether this court can relieve, by allowing an equitable set-off, on a demand for rent? [*Townrow and others v. Benson and others*] 203
4. An injunction, when sealed at the next seal, operates from the order, not from the sealing. [*Rattray v. Bishop*] - - - - - 220
5. Injunction obtained *ex parte*. The answer was put in. A motion was then made to amend the bill, without prejudice to the injunction, and the proposed amendments were stated, but the motion was refused, with costs. [*Penfold v. Storck*] 471

5. Held, on demurrer, that the Duke of Marlborough, for the time being, is, under the Act 5th Anne, c. 3. bound to maintain Blenheim House, and is not, therefore, at liberty to cut trees, which are essential to its ornament or shelter.

A tenant in tail restrained by statute from barring issue and those in re-

- mainder, is not, for that reason, within the principle of equitable waste. [*Attorney General and others v. Duke of Marlborough*] - 498
6. Upon an injunction, bill to stay proceedings at law, where the defendant is abroad, a motion, that service of the subpoena upon the attorney of the plaintiff at law, may be deemed good service, must be accompanied with an affidavit by the plaintiff in equity, as to merits, and not by his solicitor, unless he should happen to have personal knowledge of the merits. [*Kenworthy v. Accmor*] - - - 550
7. Motion refused for an injunction, on filing an interpleading bill, and affidavit. [*Croggon v. Symons*] 180

INTEREST.

- The tenant for life of the residue under a will, has no claim to interest, until one year after the testator's death. [*Stott and another v. Hollingworth and another*] - - - - 161

INTERPLEADING BILL.

See INJUNCTION, 7.

- Captain may file a bill of interpleader where parties claim adversely under the bill of lading; *sed quare*, where the adverse claims are paramount to the bill of lading. [*Lowe v. Richardson*] - - - - 277
- Note.—In a subsequent case, *Morley v. Thompson*, 29 July, 1819, the

Vice Chancellor, on reconsideration, thought a captain could file such a bill, though the adverse claims were paramount to the bill of lading; as the *right of possession* in chattels may be in one person and the *right of property* in another.

INTERROGATORIES.

See PRACTICE, 11.

ISSUE.

- Where the bill was to establish a will, and the infant heir set up insanity in the testator, but the evidence in the cause clearly proved him sane; the counsel for the infant act properly in declining an issue. [*Levy v. Levy*] - - - - 245

LEASE.

See DEMURRER, 9.

- Proviso in a lease, that lessees should not demise the premises without a licence in writing. A parol licence to underlet insufficient; but if such licence is given as a snare, and under circumstances of fraud, this Court will relieve. [*Richardson v. Evans*] - - - - - 218

LEGACY.

1. Legacy of 3,000*l.* stock, to L. E. (testator's wife) for life, and after her death, one-third part of the principal to testator's son, J. E., if

he shall be then living, and if dead, to his child or children; and a bequest, in the same manner, of one-third to each of his two daughters, M. A. E. and H. E., with a proviso, that if either of his daughters should die unmarried, and without issue, the surviving daughter to take both shares; and if both die unmarried, and without issue, then the shares to go to his son J. E., if living, or, if dead, to his children. He then gave the residue of his property, consisting of real and personal estate, to trustees; and, by a codicil, certain other real estates, to convert the same into money, in trust, as to one-third, for his son J. E., and the other two-thirds equally amongst his daughters, subject to such contingencies in favour of their issue, and with the like benefit of survivorship, as were before declared as to the 3,000*l.* stock. L. E. the testator's wife died. Held, that on her death the daughters took vested interests in their shares of the 3,000*l.* stock, and of the residue and produce of the real estates. [Laffer and Ux. v. Edwards and others]

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2. A legacy to A. of 600*l.* to be paid at the end of one year after the testator's death, or to her respective heir, held to be lapsed by the death of A. in the life-time of the testator. [Tidwell v. Ariel and others] 403
3. Where a testator directs his executors to convert his property and invest it in stock, and thereout to

pay an annuity of 250*l.* to his widow for her life, and after her death, gives the principal sum that produced the annuity, over; and the property is not, in fact, sold or invested till after the death of the widow, the legatees over are entitled to as much of the stock as would produce 250*l.* a year in dividends, and not merely to a principal sum of 5,000*l.* [Borrett and others v. Deady and others] 449

LIEN FOR COSTS.

See EXECUTOR, 3.

MORTGAGOR & MORTGAGEE.

See DEVISES AND BEQUESTS, 6.—PRACTICE, 19.

1. On a bill to redeem, the mortgagee insisted that W. B., the heir at law stated in the bill to be dead, was alive. By the decree, a reference was made to the Master to ascertain whether he was dead. He reported he was dead. Exceptions were taken to his report, and the Master directed to review the same. In the reviewed report he continued of opinion W. B. was dead. Exceptions were taken to the same, and an issue was directed whether W. B. was dead, &c.; the jury found he was dead. The exceptions were over-ruled; and held, the mortgagee ought not to pay the costs of the issue. [Wilson v. Metcalfe]

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2. Mortgagee allowed the expense of a receiver; the mortgaged property consisting of small houses at small rents, and the mortgagee living at a distance. [*Davis v. Dendy and others*] - - - 170
3. An estate was conveyed to trustees, upon trust, amongst other things, to pay a debt due to P.—P. filed a bill against the trustees for payment of his debt, stating it to be of such an amount. The trustees disputed the amount of the debt due. On payment into Court of the sum claimed by P., and of a further sum as a security for P.'s costs, and undertaking immediately to go to an account, P. was directed to release the mortgaged premises, and give up his securities. On a motion, however, afterwards made before the Lord Chancellor, he discharged this order. [*Postlethwaite v. Blythe and others*] - - - 242
4. Mortgagor filing a bill to redeem, must pay the costs of persons, defendants, claiming under the mortgagee. [*Wetherell v. Collins*] 255
5. Equitable mortgagee, by a deposit of deeds, with a writing expressing the terms of the deposit, is entitled, on a petition in bankruptcy for a sale, to have his costs out of the produce of the mortgaged property. [*Ex parte Trew*] - - - 372

MORTMAIN ACT.

See CHARITY; 1.

NOTICE.

Notice to an agent, in order to bind his principal, must be in the same transaction; and this, though the agent acted as attorney for the vendor and vendee. [*Mountford v. Scott and others*] - - - 34

PARTIES.

See DEMURRER, 2.

PARTNERSHIP.

1. F. on entering into articles of partnership with B. paid a premium. F. dies. After his death B. sold the good-will of the trade. Held, on the construction of the articles, that the representative of F. was not entitled to a share of the money for which such good-will sold. *Sensible*, on a partnership between professional persons, the good-will of a business, on the death of one, survives. [*Farr v. Pearce*] 74
2. Testator disposes of his property by his will, and directs a trade, in which he was concerned, to be carried on after his death. Held; that only the testator's capital in the trade was liable to the creditors of the trade, who became such after the testator's death, and that they had no further claim upon his assets. [*Ex parte Richardson and others, in re Hodeon and others*] - - 138
3. A partnership for a term of years is dissolved by the death of a partner before the term has expired. [*Gillespie v. Hamilton*] - - 251

4. A. and B. on entering into partnership, agreed that the manufactory and utensils in trade should be the separate property of A. and that B. should pay a rent in proportion to his share in the business. The manufactory and utensils were insured in the name of A., and were subsequently consumed by fire. Afterwards a commission issued against A. and B. Held, that the insurance money formed part of the separate estate of A. and was unaffected by the 21 Jac. I. c. 29. [*Ex parte Smith, in re Bakewell and others*] - - - - - 63

PLEA.

1. Plea, of certificate, allowed, where the plaintiff, before the bankruptcy, had a remedy by assumpsit, and for a tort; the bill being considered as brought in lieu of the remedy by assumpsit; no bill founded on a tort being sustainable. [*De Tastet v. Sharpe and others*] - - - 51
2. After plea set down, the plaintiff may amend his bill; but the plea will be allowed, with costs. [*Lopes v. De Tastet*] - - - - - 183

POWER.

1. Power to trustees, with consent of A. under her hand, with two witnesses, to advance 1,500*l.* to her husband. They advance the money without the consent of A.; afterwards A., by an instrument under her hand, attested by two witnesses,

- testifies that the money was advanced with her consent. Held, on a bill filed by A., that the trustees must refund the 1,500*l.* [*Batemen and others v. Davis and others*] 98
2. Quare, Whether, on a power given to L. E. to revoke uses "from time to time during his natural life," such revocation and re-appointment "to be signed, sealed, and delivered in the presence of, and attested by, two or more credible witnesses," can be excused by will? [*Edwards v. Edwards*] - - - - - 197
3. A power of sale given to three trustees, held not to be well executed by two surviving trustees. [*Townsend and another v. Wilson*] 261
4. Trustees having power to make leases in possession, until *cestui que trust* attained twenty-one, granted a lease in reversion, and another lease after the *cestui que trust* attained twenty-one: such leases held to be bad; and that being granted by trustees, they could not take effect out of their absolute legal estate in the premises; and that the receipt of rent by the *cestui que trust* for several years after he attained twenty-one, he being ignorant of the defects in the leases, did not operate as a new agreement; but as the plaintiff had neglected to look into his rights, and the lessees might have expended money on the premises, no account was directed beyond the filing of the bill, and no costs given to the plaintiff. [*Bowes v. East London Waterworks*] - 375

PRACTICE.

See EXCEPTIONS.—INJUNCTION.

1. A motion may be made, without consent, by a defendant in custody, upon an attachment for want of an answer, for a commission to take his answer, &c. [Mawinwaring v. Wilding] - - - - - 41
2. After an attachment for want of an answer, the defendant can only answer. [Broughton v. Jones] - 42
3. The Master, by his report, stated, he had not allowed a discharge to the executor, for want of evidence, but had received a claim. The report was excepted to; and it was admitted the evidence before the Master did not warrant the claim, but that additional evidence clearly established it. Held, that to support the exception, it must be shown that the Master ought to have allowed the discharge on the evidence before him; and that if the Master refused to act upon the additional evidence, a distinct motion should be made for a direction that he should receive it. [Ridifer and others v. O'Brien and others] - 43
4. Executor, by schedule to his answer, acknowledging that he had received the testator's property, and lent it on a promissory note, ordered to pay the money into Court. [Viggrass v. Binfield] - - - - - 62
5. Publication in a tithe cause enlarged, though frequently enlarged before, to enable the defendants to search for records in the Vatican, upon affidavits as to the probability of a successful search there. [Barnes v. Abram] - - - - - 103
6. A defendant residing in the county palatine of Lancaster was attached for want of an answer, and *cepi corpus* was returned by the sheriff. The next proceeding is to move for a messenger, upon the return of *cepi corpus*; and, afterwards, for a sequestration. [Holme v. Cardwell] 114
7. After a motion for a month's time, after cross bill answered, to answer original bill, and the cross bill is answered, and a month expired, a motion cannot be made, as of course, for further time to answer the original bill. [Noel v. King] - 183
8. Order to dismiss a bill obtained, but not served till eight months after. Between the order and the service of it, the plaintiff obtained an order to amend. Held, that the order to amend was regular. [Young v. Smith] - - - - - 196
9. An undertaking to speed a cause, signed by counsel and left at the Registrar's Office on the same day a motion to dismiss was made, held sufficient. [Lyndon v. Lyndon] 240
10. A reference having been made as to title on one motion, the party cannot afterwards by another motion have a reference as to the delivery of the abstract. [Hyde v. Wroughton] - - - - - 279
11. Practice as to exhibiting further interrogatories before the Master. [Lynn v. Buck] - - - - - 280
12. A person present at a sale is not

- permitted to open biddings. [*M'Cullock v. Cobbatch*] - - - 314
13. If the Bank of England are unnecessarily made parties to a suit, the relief against them being obtainable under the statute 39 and 40 Geo. III. the bill will be dismissed against them, with costs, to be personally paid by the plaintiffs. [*Edridge v. Edridge and others*] - 386
14. A writ of execution of an order for payment of money was issued, and afterwards an attachment, upon which the defendant was taken, and he paid the money. A motion was then made for a reference to the Master to tax the subsequent costs, and that the defendant might be ordered to pay such costs; but the motion was refused. [*Collins v. Crumpe*] - - - - - 390
15. When a cause stands over, with leave to amend the bill, and a motion becomes necessary, that the plaintiff should amend within a limited time, the plaintiff pays the costs of such motion. [*Cox v. Allington*] - - - - - 393
16. After publication passed, and which had been before enlarged at the instance of the defendant, he obtained an order as of course, again to enlarge publication, and examined witnesses. Held, that the latter order was informal; and an application, that publication might be further enlarged, or the evidence taken under the informal order might be read at the hearing of the cause, was dismissed, with costs. [*Conehard v. Hasted*] - - - 429
17. A cause cannot be set down for further directions on a separate report. An order on a separate report must be sought by petition. [*Van Kamp v. Bell*] - - - - - 430
18. Production of books, &c. referred to in answer, ordered; though contended, that the answer showed the plaintiff was not entitled to relief. [*Unsworth v. Woodcock*] - - - 432
19. On a motion for a reference under the stat. 7 Geo. II. c. 20, the Court refused to direct the Master to take into the account costs incurred at law, no mention of proceedings at law being made in the bill; but the Court gave leave to amend the bill in that respect, and directed the motion to stand over, until the bill was amended. [*Millard v. Magor*] 433
20. A subpoena was served on the defendant, by leaving it at a house in London, but he resided in the country. An attachment issued, for want of an appearance, and he afterwards appeared. Held, that it must be considered as a Town cause; and an order obtained for six weeks time to answer, was discharged, with costs, as being irregular. [*Bound and another v. Wells and others*] 434
21. If, by mistake or surprise, objections are not carried in upon a warrant to settle the Master's report, the Court will allow the party to file exceptions. [*Bowker v. Nickson*] 439

22. After decree, the *procchein assy* of infant plaintiff dies; on motion of defendant, a reference to the Master directed, to appoint another *procchein assy*. [Bracey v. Sandiford and others] - - - - - 468
23. On motion, after bill filed, and before answer, for a reference as to title; the counsel for the defendant saying, "there were other matters in question, besides the title," the motion was refused. [Matthews v. Davis] - - - - - 470
24. Husband and wife, being defendants to a suit, and the wife living separate from the husband, he was allowed, on affidavit of the fact, and that he had no control or influence over her, to put in a separate answer; and an order was made, that he should not be liable to process, if she neglected to put in an answer. [Barry v. Cane and Ux.] 472
25. After an injunction granted against one of two defendants, who afterwards put in their answers, leave was given on an application for that purpose, upon affidavit, to amend the bill, without prejudice to the injunction; the answer of the defendant against whom the injunction was not granted, stating facts which were a surprise on the plaintiff, and rendered the amendments necessary. [Vesey v. Wilkes and another] - - - - - 475
26. The Master, on a reference, making use of affidavits instead of interrogatories, he was directed not to pro-
- ceed on the affidavits, with liberty, under the circumstances, to apply to the Court, if by death or otherwise, it became impossible to obtain, under a commission, the evidence of the persons who had made the affidavits. [Tillotson v. Hargrave] - - 494
27. A motion may be made on a bill for a specific performance for a reference as to the title, and whether a title was shown prior to the filing of the bill. [Anonymous] - - 495
28. The Master having certified generally, that the examination was impertinent, the Vice-Chancellor, on motion, referred it back to the Master to review his certificate, and state in what respects he considered the same as impertinent. [Anonymous] - - - - - 246
29. The defendant obtained two orders for time to answer, which expired; he then applied, by petition, at the Rolls, for a third order for time. After the petition was answered, but before the order was drawn up, or any notice of the petition was given to the plaintiff, an attachment issued, which was now sought to be set aside; but the motion was refused, with costs. [Newcombe v. Rawlings] - - - - - 246
30. Application for an order to suspend the payment of the costs of a bill which had been dismissed, on the ground of an appeal to the Lord Chancellor, but motion refused. [Tyson v. Car] - - - - - 278
31. In future, all references of answers

of defendants for insufficiency, or for scandal and impertinence, or for impertinence, made in the same cause, are to be made to the same Master; and where answers of defendants have been referred for scandal and impertinence, or for impertinence, and the Court shall afterwards refer the same for insufficiency, the latter reference is to be made to the same Master as the former reference. [General Order]

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32. In future, if a party gives a notice of motion, and does not move accordingly, he shall, when no affidavit is filed, pay to the other side forty shillings costs, upon production of the notice of motion. But when an affidavit is filed by either party, the party giving such notice of motion, and not moving, shall pay to the other side costs, to be taxed by the Master, unless the Court itself shall direct, upon production of the notice of motion, what sum shall be paid for costs. [General Order]

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33. When the Court is moved for the payment of costs, under the general order of the 5th of August 1818, (see p. 318) on account of a notice of motion which has been abandoned, such notices of the motion must be mentioned to the Court, and must also be produced to the Registrar before he draws up the order. [Withey v. Haigh] - 437

34. Creditor proceeding at law against an executor, after notice of a decree

against him to account, is so far in the nature of a contempt of Court, that upon an application for an injunction, the Court will refuse him the costs of the further proceedings at law, and the costs of the application. [Curre v. Bowyer] - - 456

35. On opening of biddings, ten per cent. to be deposited. [Anonymous]

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Gibbins v. Howell, (in note) ibid.
36. If answer is put in, and exceptions are taken to the answer, the defendant cannot move upon the answer, that the plaintiff may be put to his election to proceed at law or equity. [Browne v. Poyntz] - 24

37. Motion cannot be renewed unless the costs of the former notice of motion are paid. [Bellchamber v. Giam] - - - - - 550

PRINCIPAL AND AGENT.

Notice to an agent, in order to bind his principal, must be in the same transaction; and this, though the agent acted as attorney for the vendor and vendee. [Mounfورد v. Scott and others] - - - - - 34

PRINCIPAL AND SURETY.

Giving time to the principal, the grantee of an annuity, exonerates the surety from past, as well as future, arrears. [Eyre v. Dartrop]

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PRODUCTION OF BOOKS.

See PRACTICE, 18.

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PROVISO.

See LEASE.

PUBLIC-AUCTION.

See REVERSION.

PURCHASE MONEY.

See VENDOR AND VENDEE, 1. 3, 4.

RECEIVER.

See DEMURRER, 1.—MORTGAGOR AND MORTGAGEE, 2.

1. Limitation of a term for five hundred years to raise portions for younger children, and afterwards, estate limited to T. M. for life, with remainders over, and a decree made to sell the term for raising the portions. T. M. tenant for life refusing to produce the title-deeds before the Master, and obstructing the decree; an order was made, on motion, for a receiver of the rents and profits of the estate. [*Brigstocke v. Mansel* and others] 47
2. Motion, on behalf of a receiver appointed under a creditor's bill, for a reference to the Master, to see if it would be for the benefit of all parties that he should be enabled to grant leases of the estates. The estates were settled on A. for life, with remainder to B. an infant. Held, there could not be such a reference. [*Gibbins v. Howell*]

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RENEWAL OF LEASES.

See DEMURRER, 9.

RENT.

See INJUNCTION, 3.

REVERSION.

See COPYHOLD, 2.—VENDOR AND VENDEE, 7.

A sale of a reversion, by public auction, held good, and the purchaser not bound to show he has given the full value. [*Shelly v. Nash* and another] - - - - - 232

SALE, POWER OF.

See POWER, 3.

SEPARATE ESTATE.

See FEME COVERT, 2.

SETTLEMENT.

1. Limitations in a marriage settlement to the brothers of the settlor, are not good against a subsequent purchaser for a valuable consideration. [*Johnson and others v. Legard and others*] - - - - 283
2. Limitations in a marriage settlement in favour of the issue of a second marriage by the settlor, held good against a purchaser for a valuable consideration; such limitations being interposed between the limitations to the sons of the first marriage and the daughters

of such marriage. [*Johnson and others, v. Legard and others*] in note, 302

SET-OFF.

See INJUNCTION, 3.

SHIP.

See DEMURRER, 4.

SPECIFIC PERFORMANCE.

See DEVISES AND BEQUESTS, 1.—
VENDOR AND VENDEE, 2.

SURETY.

See PRINCIPAL AND SURETY.

TENANT IN TAIL.

Tenant in tail restrained by statute from barring issue and those in remainder, is not, for that reason, within the principle of equitable waste. [*Attorney General v. Duke of Marlborough*] - - - - 498

TITLE DEEDS.

See VENDOR AND VENDEE, 5.

TRUSTEES.

See POWER, 1.

TITHES.

See COSTS, 4.

Agistment tithe is not claimable for afterpasture, where the lands have

been mown, in the same year, and paid tithe. [*Batchellor v. Smallcombe*] - - - - 12

VENDOR AND VENDEE.

See NOTICE.

1. Bill filed for a specific performance of an agreement to purchase, and demurred to. Order made, that on a conveyance of the estate from the plaintiff to the defendant, being deposited with the Master, the vendee should pay into Court his purchase-money; which order was complied with. Motion, that the Master should deliver the conveyance to the vendee, refused. [*Cutler v. Broughton*] - - - - 95
2. Held, that a lessee, subject to covenants, cannot compel a specific performance of an agreement to purchase the premises, though he offered to indemnify the purchaser against the performance of the covenants. [*Fildes v. Hooker*] 193
3. Purchaser in possession, who has made alterations and improvements on the estate, ordered to pay the purchase-money into Court. [*Bramley v. Teal*] - - - - 219
4. A purchaser in possession, making improvements, &c. but objecting to the title, not obliged to pay purchase-money into Court. [*Gell v. Watson*, 225
5. The vendor of an estate having lost his title-deeds, agreed to give the vendee a real security against such loss. The vendee, on a bill for a spe-

- cific performance of the agreement, stated, he had not real property sufficient for such security, but offered ample personal security. Held, vendor was bound to procure a sufficient real security. [*Walker and others v. Barnes*] - - - - - 247
6. The completion of a contract being delayed for three years, by difficulties in the title, the vendor held accountable for a deterioration of the land during that period. [*Foster v. Deacon*] - - - - - 394
7. A tenant for life, with a remainder man in tail, both in distress, join in selling the estate for an inadequate consideration. Held, that it could not be considered as the sale of a reversionary interest, and subject to the rules relating to sales of such interests; but that the sale was invalid, on account of the inadequacy of the consideration, coupled with the distress of the vendors, and their want of advice. [*Wood v. Abrey*] - - - - - 417
8. Time may be made of the essence of a contract, but though made so, the strict performance of the contract may be waived by conduct. [*Hudson v. Bartram*] - - - 440

WASTE.

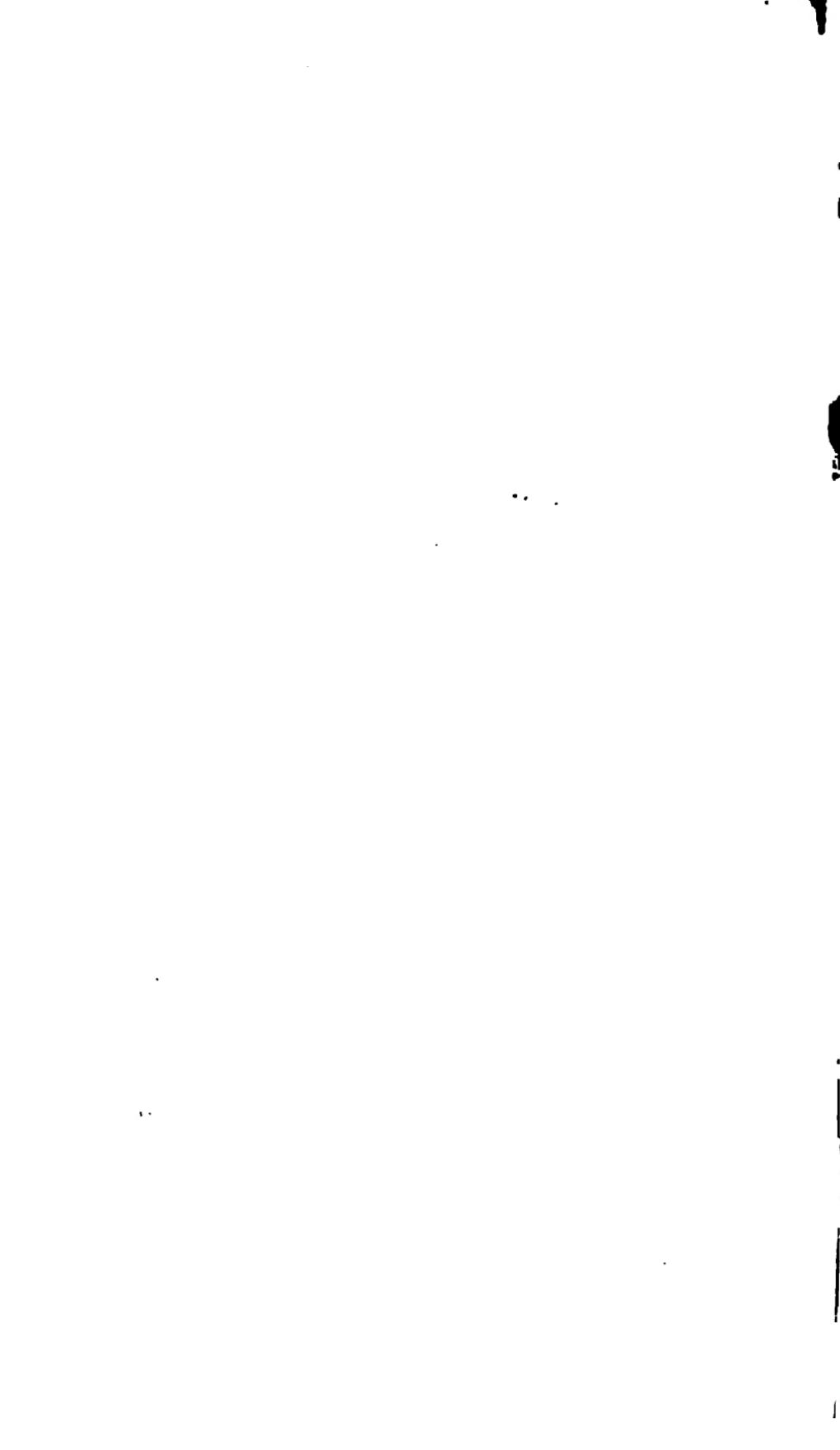
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